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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NORTHERN NATURAL GAS COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether Congress granted the Federal Energy Regulatory Commission (FERC) the authority to regulate gathering under the provisions of the Natural Gas Act of 1938 (NGA), 15 U.S.C. §717 *et seq.*, when Section 1(b) of such Act places only two activities within FERC jurisdiction—transportation of natural gas in interstate commerce and sales in interstate commerce of natural gas for resale—and expressly states that "[t]he provisions of this Act . . . shall not apply to . . . gathering of natural gas."

2. Whether a corporation which is engaged solely in gathering and, therefore, not a "natural-gas company" as defined in NGA Section 2(6), is subject to FERC regulation merely because it is affiliated with an interstate pipeline company.

LIST OF PARTIES

In addition to the parties listed in the caption of the case (App. at 1a), parties to the proceeding in the court below include:

ANR Pipeline Company
Interstate Natural Gas Association of America
Iowa Public Service Company
Metropolitan Utilities District of Omaha
Natural Gas Pipeline Company of America
Northern Illinois Gas Company
Northern Municipal Distributors Group
Pennzoil Company
Process Gas Consumers Group

RULE 29.1 LISTING

Northern Natural Gas Company's parent company, Enron Pipeline Company, is a subsidiary of Enron Corp. The following is a listing of subsidiaries (except wholly owned subsidiaries) of Enron Corp.:

Bannon International Limited
Citrus Corp.
Clear Lake Cogeneration Limited Partnership
Enron Arbross Ship Management Co. Ltd.
Enron/Dominion Cogen Corp.
Enron Oil & Gas Company
HT Gathering Company
Halton International Limited
Interruptores Especializados Lara, S.A.
Manufacturers de Aparatos Domesticos, S.A. (MADOSA)
Milford Power Limited Partnership
Mojave Pipeline Company
Mundogas Orinoco Limited
Norelf Limited
Oasis Pipe Line Company
San Marco Pipeline Company
Seagull Shoreline System Transmission Company

The Standard Shale Products Company
Tarumi Enterprises Ltd.
Teesside Gas Transportation Limited
Teesside Power Limited

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Northern Natural Gas Company (Northern) respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on April 4, 1991, in *Northern Natural Gas Company, Division of Enron Corp.* v. *F.E.R.C.*, which affirmed orders of the Federal Energy Regulatory Commission (FERC)[1] asserting jurisdiction over Northern's gathering service.

OPINION AND ORDERS BELOW

The opinion of the court below is reported at 929 F.2d 1261 and is reprinted in the Appendix (pp. 1a-29a). The following orders involving Northern were issued by FERC and its staff in the proceedings below: Order Approving Contested Offer of Settlement as Modified, 37 FERC ¶61,272 (December 22, 1986); Order Granting in Part and Denying in Part Rehearing and Granting Clarification, 41 FERC ¶61,158 (November 9, 1987); Letter Order, issued January 28, 1988 (unreported); Letter Order, 43 FERC ¶61,158 (April 14, 1988); Order Denying Appeal of Staff Action and Denying Rehearing, 43 FERC ¶61,473 (June 15, 1988); and Order Denying Rehearing, 44 FERC ¶61,384 (September 22, 1988). Such FERC orders are reprinted in the Appendix (pp. 30a-56a.)

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1991, and the mandate was issued on May 13, 1991. The jurisdiction of this Court is invoked under Section 19(b) of the Natural Gas Act of 1938 (NGA), 15 U.S.C. §717r(b), and 28 U.S.C. § 1254(1).

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[1] As used herein, "FERC" encompasses that agency's predecessor, the "Federal Power Commission," and references to "FPC" and "Commission."

STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the NGA, 15 U.S.C. §717 *et seq.*: Section 1(b), 15 U.S.C. §717(b); Sections 2(1) and 2(6), 15 U.S.C. §§717a(1) and a(6); Section 4, 15 U.S.C. §717c; Section 5, 15 U.S.C. §717d; and Section 7, 15 U.S.C. §717f. Also involved herein are Sections 110(a) and 601(a)(1)(A)-(D) of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. §3320(a) and §3431(a)(1)(A)-(D). The verbatim texts of these statutory provisions are set forth in the Appendix (pp. 60a-73a).

STATEMENT OF THE CASE

Northern, an interstate pipeline, commenced the FERC proceeding below by filing under NGA Section 4, 15 U.S.C. §717c, to decrease its rates for services which are subject to FERC jurisdiction, *i.e.*, its "transportation of natural gas in interstate commerce" and its "sale in interstate commerce of natural gas for resale." NGA Section 1(b), 15 U.S.C. §717(b).[2] Northern's rate filing did not propose rates for Northern's activities which are not subject to FERC jurisdiction, such as its direct sales and gathering. As stated by the court below, "[g]athering and interstate transportation are specifically distinguished in §1(b) of the NGA . . . ." (App. at 6a.) " '[G]athering' refers to the process of collecting gas at the point of production (the wellhead) and moving it to a collection point for further movement through a pipeline's principal transmission system," while " '[t]ransportation' involves the movement of gas through a pipeline's principal transmission system." (App. at 9a; footnote omitted.)

Northern filed a Settlement to resolve its Section 4 rate proceeding which contained agreed-upon rates for North-

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[2] Pursuant to NGA Section 4(c), 15 U.S.C. §717c(c), Northern is required to file with FERC its rates for "any transportation or sale subject to the jurisdiction of the Commission." Northern's rates for such services are subject to FERC's determination of lawfulness under the standards of NGA Sections 4(e) and 5(a), 15 U.S.C. §§717c(e) and 717d(a).

ern's sales of natural gas for resale in interstate commerce and transportation of natural gas in interstate commerce. In establishing these rates, the Settlement contained allocations of costs to such jurisdictional services and to nonjurisdictional services such as direct sales and gathering. It did not contain rates for such nonjurisdictional services because, consistent with FERC's interpretation of the NGA for over 50 years, Northern's recovery of the costs allocated to nonjurisdictional services is dependent on the market prices obtained for such services.

On December 22, 1986, FERC approved the Settlement with modifications, including the requirement that Northern file a rate for its gathering service. (App. at 30a-32a.) Following FERC's denial of rehearing on November 9, 1987 (App. at 33a-35a), Northern filed Original Sheet No. 4g.3 (App. at 57a), which stated a range for Northern's gathering rates of $0.2202 to $0.0150 per MMBtu and also contained a footnote disclaiming any FERC jurisdiction over gathering. On January 28, 1988, FERC's staff rejected such tariff sheet on the ground that the gathering rates were not just and reasonable, and required the removal of the footnote. (App. at 36a-37a.) Northern filed an appeal from the January 28, 1988 Order and also filed a revised Original Sheet No. 4g.3 (App. at 58a), under compulsion of such order, which removed the footnote and stated lower rates for gathering, *i.e.*, a maximum rate of $0.1471 and a minimum rate of $0.0100. Such tariff sheet was accepted by FERC on April 14, 1988. (App. at 38a-39a.) On June 15, 1988, FERC denied Northern's appeal from the January 28, 1988 Order and also denied rehearing of the April 14, 1988 Order. (App. at 40a-47a.) Rehearing of the June 15, 1988 Order was denied on September 22, 1988. (App. at 48a-56a.)

The jurisdiction of the court below was invoked pursuant to the judicial review provisions of NGA Section 19(b), 15 U.S.C. §717r(b). The court below found that NGA Sections 4 and 5 provide FERC with "explicit" authority to regulate gathering, notwithstanding Section 1(b)'s express language that "[t]he provisions of this Act . . . shall not apply

to . . . gathering of natural gas." (App. at 21a.) The court below concluded that the authority found in Sections 4 and 5 over gathering rates charged by a "natural-gas company" extends to all affiliates of an interstate pipeline, notwithstanding the fact that a separately incorporated company engaged solely in gathering is not a "natural-gas company" as defined in NGA Section 2(6). (App. at 3a, n. 2.)

REASONS FOR GRANTING THE WRIT

The court of appeals fully embraces FERC's policy arguments as to why that federal agency should regulate gathering. In order to advance FERC's stated policy, however, the court below adopts an interpretation of the NGA that is in direct conflict with express statutory language, opinions of this Court, and opinions of the Tenth Circuit and D.C. Circuit. FERC's policy arguments cannot overturn Congress' policy determination, made in unambiguous terms in NGA Section 1(b), that FERC's regulatory reach under the provisions of the NGA shall not extend to gathering. At issue is the fundamental constitutional principle that the people's lives and property shall not be subject to the heavy hand of federal regulation unless their elected representatives have determined that such control is in the public interest. The economic consequences of FERC's attempt to use policy arguments to expand its domain affect an entire industry and over $2 billion of gathering facilities built in reliance on a statutory exclusion from regulation, to which FERC itself adhered for over 50 years. Congress' express exclusion of gathering from regulation under the provisions of the NGA requires FERC to take its policy arguments for a repeal of that express exclusion to Congress, not the courts.

I. THE OPINION BELOW IS IN DIRECT CONFLICT WITH EXPRESS STATUTORY LANGUAGE AND THE OPINIONS OF THIS COURT.

A. The express language of Section 1(b).

Congress could not have been more straightforward or explicit in the NGA—it carefully defined the specific ac-

tivities that would be subject to the provisions of the NGA and explicitly excluded other activities as to which "[t]he provisions of this Act . . . *shall not* apply . . . ." NGA Section 1(b), 15 U.S.C. §717(b) (emphasis added). Congress placed only two activities under FERC control—the transportation of natural gas in interstate commerce and the sale in interstate commerce of natural gas for resale:

> The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale . . . .

Id. Congress was well aware of the activity of gathering and explicitly excluded it from *all* provisions of the NGA:

> The provisions of this Act . . . shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Id.

The court below did not find the language of Section 1(b) explicitly excluding gathering from the provisions of the NGA to be persuasive; that would be "too simple an answer." (App. at 2a.) Instead, it found that NGA Sections 4 and 5, which do not even mention "gathering," override Section 1(b) and constitute "explicit congressional authority" to regulate gathering. (*Id.* at 21a.)[3] The portions of Sections 4 and 5 relied upon by the court below refer to

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[3] The court below properly recognized that FERC's "regulatory gap" argument had no merit. (App. at 20a-21a.) Such an argument is applicable only "where congressional authority is not explicit." *F.P.C.* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 19-20 (1961). However, instead of finding explicit language in Section 1(b) excluding gathering from the provisions of the NGA, the court below found "explicit" authority in Sections 4 and 5 to regulate gathering.

FERC's jurisdiction over rates "for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission," Section 4(a), 15 U.S.C. §717c(a), and any rate charged "in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission . . . ." Section 5(a), 15 U.S.C. §717d(a).

The court below found that the "for or in connection with" language of Section 4 and the "in connection with" language of Section 5 provide "explicit congressional authority" to extend FERC control into an entirely distinct area, gathering, that is not even mentioned in such sections. It must be emphasized that the only reference to "gathering" contained in the NGA appears in Section 1(b), where Congress explicitly excludes it from *all* "provisions of this Act," including Sections 4 and 5. Thus, the NGA clearly and unambiguously excludes gathering from FERC jurisdiction, and " '[i]f the statute is clear and unambiguous, "that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." ' " *Mobil Oil Exploration & Producing Southeast Inc.* v. *United Distribution Companies*, 111 S.Ct. 615, 623 (1991). The "elementary tenet of statutory construction that '[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one . . . ,' " *Guidry* v. *Sheet Metal Workers Nat. Pension Fund*, 110 S.Ct. 680, 687 (1990), applies even more strongly to attempts to use general language to override a specific provision within the same statute. It requires an enormous leap in statutory interpretation to conclude that Congress intended the general language used in Sections 4 and 5 to extend FERC's regulatory reach to an activity that, in the very first section of the statute, Congress had specifically focused upon and excluded from FERC control in no uncertain terms.

B. The legislative history of the NGA.

Without any citation to the legislative history of the NGA, which this Court has found relevant in its previous

reviews of the Act, the court below draws a conclusion as to Congress' purpose, claiming that Congress foresaw FERC's need to regulate "other aspects of the natural gas industry" and provided the authority to do so through Sections 4 and 5. (App. at 27a.) Such claim is in direct conflict with this Court's prior findings that "Congress was 'meticulous' only to invest the Commission with authority over certain aspects of this field, leaving the residue for state regulation." *F.P.C.* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 8 (1961) (*Transco*); *see Northwest Central Pipeline Corp.* v. *State Corp. Comm'n of Kansas*, 109 S.Ct. 1262, 1273-74 (1989); *F.P.C.* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 502-03 (1949).[4] As stated by this Court, "the Act does not intrude on the domain traditionally reserved for control by state commissions; and the Federal Power Commission was given no authority over 'the production or gathering of natural gas.' §1(b)." *F.P.C.* v. *Hope Natural Gas Co.*, 320 U.S. 591, 612-13 (1944). "Congress knew this necessary relationship between production and distribution but excluded the Commission from exercising any direct control or regulation over the actual production and gathering of natural gas." *Panhandle*, *supra*, 337 U.S. at 507.

C. This Court's express finding that Sections 4 and 5 "do not concern" the gathering of natural gas.

The finding of the court below that Sections 4 and 5 provide "explicit congressional authority" to regulate gathering is in direct conflict with this Court's finding that such sections "do not concern the producing or gathering of natural gas" and are "limited by their express terms" to "the interstate sale and transportation of gas":

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[4] The legislative history of the NGA shows that the plain language of Section 1(b) was adopted because Congress wanted to establish federal regulation over interstate transportation and sales for resale, which had been held not subject to state regulation, but to exclude other activities such as gathering. *See* H. Rep. No. 709, 75th Cong., 1st Sess., at 1-2.

> *Sections 4, 5 and 7 do not concern the producing or gathering of natural gas; rather they have reference to the interstate sale and transportation of gas and are so limited by their express terms.* Thus §§ 4(a), (b), (c), 5(a) and 7(c) speak of 'transportation or sale of natural gas subject to the jurisdiction of the Commission' while § 7(a) and (b) refer respectively to 'transportation facilities' and 'facilities subject to the jurisdiction of the Commission.'

Panhandle, supra, 337 U.S. at 508 (emphasis added).

The conflict between this Court and the court below is placed in stark contrast by this Court's emphatic admonition that "*nothing*" in Sections 4 and 5 indicates that FERC's authority over sales for resale and transportation, addressed in such sections, was intended to "swallow" the explicit exceptions to FERC control contained in Section 1(b), such as the exception for gathering:

> *Nothing in the sections indicate that the power given to the Commission over natural-gas companies by § 1(b) could have been intended to swallow all the exceptions of the same section* and thus extend the power of the Commission to the constitutional limit of congressional authority over commerce. The repetition of the words 'subject to the jurisdiction' makes clear to us the intent to keep the Commission's hands out of the excepted local matters.

Id. (emphasis added). Thus, the opinion below is poles apart from this Court's analysis in *Panhandle*, which concluded that Sections 4 and 5 address the manner in which FERC authority is to be exercised over activities placed under its jurisdiction by Section 1(b); they do not place additional activities under FERC control so as to "swallow" the exceptions contained therein.

The court of appeals dismisses this Court's analysis in *Panhandle* with the following sentence:

> In *FPC v. Panhandle Eastern Pipe Line Co.*, which involved an attempt by the Commission to prevent a transfer of gas leases, the Court held that the gathering and production exemptions applied to producing and gathering *facilities*, including leases.

(App. at 22a; footnote omitted; emphasis in original.) The emphasis placed on the word "facilities" by the court below is an indication of the fact that it has adopted a "split" reading of the NGA, *i.e.*, it finds that FERC has rate jurisdiction over gathering under Sections 4 and 5 but no certificate or abandonment jurisdiction over gathering facilities and activities under Section 7. This "split" reading is in direct conflict with the express language of the NGA and this Court's analysis in *Panhandle*. Section 1(b) excludes gathering from *all* provisions of the NGA—Sections 4 and 5 are excluded to the same extent as Section 7. In *Panhandle*, this Court found no difference between Section 7 and Sections 4 and 5—they *all* "do not concern the producing or gathering of natural gas" and "nothing" contained therein indicates that the power granted in Section 1(b) "could have been intended to swallow all the exceptions of the same section . . . ." 337 U.S. at 508.

D. The claim that regulation of gathering rates does not "affect" gathering facilities or the activity of gathering.

The court below claims that its "split" reading of the NGA is not contrary to the explicit words of Congress and this Court if one accepts the proposition that FERC regulation of gathering rates is somehow not really regulation of a precluded area because it is "narrowly confined to rates" and "[n]either gathering facilities nor the physical activity of gathering is affected." (App. at 22a.) As discussed above, the obvious flaw in such argument is that Congress has explicitly provided, and this Court has explicitly stated, that gathering is not subject to regulation under *any* of the provisions of the NGA, "rate" or otherwise. Moreover, it can hardly be claimed that an activity

or use of a facility is not "affected" when government reaches its hand into a person's pocket to control the price charged even if the government does not dictate the design of the facility or mandate that the activity be conducted in a particular manner.

E. The argument that Section 1(b) must be strictly construed.

The court below claims that its "split" reading of the NGA is supported by the need to strictly construe Section 1(b) and somehow sanctioned by this Court's statements that the gathering exemption is limited to the "physical activities of gathering." (App. at 21a-22a.) In fact, this Court has never sanctioned a "split" reading of the NGA which would authorize FERC control of gathering rates under Sections 4 and 5 but preclude FERC certificate and abandonment jurisdiction over gathering facilities and activities under Section 7. The court below relies on *Northern Natural Gas Co.* v. *State Corp. Comm'n of Kansas*, 372 U.S. 84 (1963), which discusses a long line of cases beginning with *Colorado Interstate Gas Co.* v. *F.P.C.*, 324 U.S. 581 (1945), and *Interstate Natural Gas Co.* v. *F.P.C.*, 331 U.S. 682 (1947). However, such cases provide no support for a "split" reading of the NGA.

In *Colorado Interstate*, the very first case cited by the court below, this Court stated that "[c]ertainly that provision [NGA Section 1(b)] precludes the Commission from *any* control over the activity of producing or gathering natural gas." 324 U.S. at 602-03 (emphasis added). Thus, rather than supporting the opinion below, the opinion of this Court in *Colorado Interstate* is directly at odds with it.

This Court's statement in *Interstate Natural* that the production and gathering exemption must be "strictly construed" does not in any way authorize FERC to extend its jurisdiction into the separate and distinct area of gathering from which it is expressly excluded. Rather, such statement relates to the fact that the production and gathering exemption cannot be used to exclude a company's

sales for resale in interstate commerce from FERC regulation. 331 U.S. at 690-91. FERC's attempt to regulate gathering in this case amounts to an attempt to create for itself *another* "primary grant of jurisdiction," over gathering, in addition to Congress' grant of jurisdiction over transportation in interstate commerce and sales for resale in interstate commerce.

The reference in *Interstate Natural* to strictly construing the Section 1(b) exemption is quoted in this Court's subsequent opinion in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954). FERC's order below goes so far as to claim that *Phillips* limited the gathering exemption to only "*non-price* matters such as the 'physical activities, facilities, and properties used in the . . . gathering of natural gas' . . . ." (App. at 46a; footnote omitted; emphasis added.) Contrary to FERC's suggestion, however, this Court held in *Phillips* that FERC has *no* authority over "the physical activities, facilities, and properties used in . . . gathering"; it did not construe the Section 1(b) gathering exemption as somehow limited to only "non-price" matters while granting FERC authority over gathering to the extent of "price matters." 347 U.S. at 678. Significantly, *Phillips* relies upon both *Panhandle*, which stated that "Congress . . . excluded the Commission from exercising *any* direct control or regulation over the actual . . . gathering of natural gas," 337 U.S. at 507 (emphasis added), and *Colorado Interstate*, which stated that Section 1(b) "precludes the Commission from *any* control over the activity of producing or gathering natural gas." 324 U.S. at 602-03 (emphasis added).

In *Northwest Central*, *supra*, this Court explained that the powers granted to FERC by Section 1(b) cannot be construed so as to eliminate the areas reserved to the states because "Congress has expressly divided regulatory authority between the States and the Federal Government in NGA §1(b)," 109 S.Ct. at 1276, and "we must take seriously the lines Congress drew in establishing a dual regulatory system . . . ." *Id.* at 1275. As stated by this Court, "Section 1(b) of the NGA . . . expressly carves out

a regulatory role for the States, however, providing that the States retain jurisdiction over intrastate transportation, local distribution and distribution facilities, and over 'the production or gathering of natural gas.' " *Id.* at 1272. This Court found that the rate impact on consumers of state regulation of production did not justify construing FERC's authority as preempting an area expressly reserved to the states because that would "largely . . . nullify that part of NGA §1(b) that leaves to the States control over production, for there can be little if any regulation of production that might not have at least an incremental effect on the costs of purchasers in some market and contractual situations." *Id.* at 1276. The finding of the court below that this case "involves interstate rates for which no local interest attaches and to which the states could not constitutionally or practicably exercise regulatory power" (App. at 28a-29a; footnote omitted) flies in the face of Congress' determination, and opinions of this Court, that gathering is an area reserved to the states.

F. *Colorado Interstate* and the importance of this Court's finding therein that "the authority of the Commission to suspend rates is restricted to rates over which it has jurisdiction."

The court below initially states that the FERC Order at issue is "not substantively different from the orders upheld" in *Colorado Interstate, supra.* (App. at 17a.) In fact, FERC in this case has trampled over the clear line established in *Colorado Interstate,* which provides that while FERC may determine the proper level of all costs included in a rate for a jurisdictional service, including the costs of nonjurisdictional services, it has no authority to require the filing of, or determine the level of, a rate for a nonjurisdictional service. As succinctly stated by this Court, "[t]he short answer, however, is that the authority of the Commission to suspend rates is restricted to rates over which it has jurisdiction." 324 U.S. at 596.

The court below next asserts that it would be "inconsistent" to hold that FERC may review the reasonableness

of the costs of gathering that are included in a jurisdictional sale for resale rate, but prohibit FERC from regulating the rate for gathering when a person contracts separately for gathering, for transportation, and for the purchase of the gas itself. (App. at 18a.) In the latter instance, however, the three components are separately priced and the gathering costs are not included in the jurisdictional rate. The differing regulatory consequences are logical and flow from a determination made by Congress. The fact that the express language of the NGA and *Colorado Interstate* give rise to an "inconsistency" in FERC's regulatory reach does not provide a basis to override statutory language and the opinions of this Court. An "inconsistency" also arises from the presence of FERC regulation over sale for resale rates and the absence of FERC regulation of the rate for direct sales, *see Transco, supra*, but this "inconsistency" provides no basis for extending FERC regulation to direct sales, which, like gathering, have been excluded from its regulatory reach.

The court below finally concludes that the line drawn by this Court in *Colorado Interstate* prohibiting rate regulation of nonjurisdictional activities "doesn't matter" because it is a mere "formalism." (App. at 26a.) The court below reaches this conclusion because its view of Section 1(b) is diametrically opposed to this Court's finding in *Colorado Interstate* that Section 1(b) "precludes the Commission from *any* control over" gathering. 324 U.S. at 602-03 (emphasis added). Having used Sections 4 and 5 to erase the line drawn by Congress in Section 1(b) expressly excluding gathering from *all* provisions of the NGA, recognized by this Court in *Panhandle*, the court below is free to discard the line drawn by this Court in *Colorado Interstate* as a mere "formalism" that "doesn't matter."

In the view of Northern, this Court's opinion in *Colorado Interstate* established an important distinction that *does* matter. Accordingly, a detailed discussion of this Court's analysis is warranted herein. At issue in *Colorado Interstate* was FERC's order that Canadian River Gas Company (Canadian) reduce its jurisdictional sales rate. *Id.* at 595.

Canadian claimed that such rate had been unlawfully determined because it included an allocation of production and gathering costs, which were beyond FERC's jurisdiction. *Id.* at 597-604. Canadian argued that FERC's lack of jurisdiction over production and gathering required it to establish a "fair field price" or "fair market value" for its natural gas, which would be included in the jurisdictional sales rate. *Id.* at 600. Thus, under Canadian's proposed method, its jurisdictional sales rate would include the costs of its jurisdictional transportation and a "fair market value" price for its natural gas that would compensate it for the costs of its nonjurisdictional production and gathering service.

In *Colorado Interstate*, this Court held that FERC may consider production and gathering costs "for the purposes of determining the reasonableness of rates *subject to its jurisdiction.*" *Id.* at 603 (emphasis added). This Court rejected the argument that when property is used to provide both interstate and intrastate service, FERC must adopt the method of separating the physical property itself rather than using the method of allocating costs to jurisdictional and nonjurisdictional services. *Id.* at 586.[5] The critical consideration in *Colorado Interstate* is the fact that the jurisdictional sales rate at issue therein *included* both the costs of jurisdictional transportation and an allocation of the costs of nonjurisdictional production and gathering. This Court held that FERC has the authority to determine the proper level of costs that are *included in* a jurisdictional rate, even if the costs relate to services that are nonjurisdictional pursuant to NGA Section 1(b). However, this Court made clear that FERC's authority to determine the proper level of all costs *included in* a jurisdictional rate "for the purposes of determining the reasonableness of rates subject to its jurisdiction," *id.* at 603, even those

[5] This Court noted that where the same property is used to provide both jurisdictional and nonjurisdictional services, the "difficulties of separation are obvious." *Id.* at 589. Following the method endorsed in *Colorado Interstate*, proceedings before FERC routinely involve the allocation of costs between jurisdictional and nonjurisdictional services.

of a nonjurisdictional activity, does not mean that FERC can regulate the nonjurisdictional activity because "the authority of the Commission to suspend rates is restricted to rates over which it has jurisdiction," *id.* at 596, and Section 1(b) "precludes the Commission from any control over the activity of producing or gathering natural gas." *Id.* at 602-03.

FERC's allocation of gathering costs between jurisdictional sales, which are subject to FERC rate regulation, and gathering for third parties, which is beyond its jurisdiction, is similar to its allocation of gathering costs between jurisdictional sales by the pipeline and its direct sales, which are beyond FERC rate jurisdiction. This Court explained in detail that FERC's authority to allocate costs, including the costs of nonjurisdictional services, does not grant it jurisdiction over the rate for the nonjurisdictional service:

> The function which an allocation of costs (including return) is designed to perform in a rate case of this character is clear. The amount of gross revenue from each class of business is known. *Some of those revenues are derived from sales at rates which the Commission has no power to fix.* The other part of the gross revenues comes from the interstate wholesale rates which are under the Commission's jurisdiction. The problem is to allocate to each class of the business its fair share of the costs.

Id. at 588 (emphasis added). Once FERC allocates costs between nonjurisdictional services and jurisdictional services, it has authority only over the rates for jurisdictional services:

> *It is of course immaterial that the revenues from the intrastate sales or the direct industrial sales may exceed their costs, since the authority to regulate those phases of the business is lacking.* To the extent, however, that the revenues from the interstate wholesale business exceed the costs al-

> locable to that phase of the business, the interstate wholesale rates are excessive.
>
> * * * *
>
> *The Commission did not include in the rate reductions which it ordered any of the excess revenues over costs from the unregulated business.* The reductions ordered were measured solely by the excess revenues over costs in the regulated business . . . .

Id. (emphasis added).

Consistent with *Colorado Interstate*, FERC routinely allocates gathering costs in pipeline rate cases between jurisdictional sales service, as to which it establishes a rate, and nonjurisdictional gathering for third parties, as to which FERC has no jurisdiction to establish a rate. FERC does not dispute that this long has been its traditional practice. Its justification for its attempt to impose rates on a service that it traditionally has treated as nonjurisdictional is that more volumes are gathered for third parties today than in the past, as the result of purchasers' decisions to contract separately for transportation, gathering and the gas itself. A change in the level of volumes gathered for third parties, however, hardly constitutes statutory authority for the expansion of FERC jurisdiction into an area expressly excluded by Congress.

II. THE OPINION BELOW CONFLICTS WITH OPINIONS OF THE TENTH CIRCUIT AND D.C. CIRCUIT.

A. The Tenth Circuit Opinion in *Northwest*.

The issue of whether FERC has authority to regulate gathering recently was considered in *Northwest Pipeline Corp. v. F.E.R.C.*, 905 F.2d 1403 (10th Cir. 1990). In *Northwest*, the Tenth Circuit found that FERC had improperly applied its "primary function" test and remanded for a determination of whether the pipeline's facilities are "gathering and exempt from Commission jurisdiction, or

transportation and subject to jurisdiction." *Id.* at 1412.[6] As noted by the court below, the Tenth Circuit expressly declined to consider the argument that Sections 4 and 5 grant FERC authority to regulate gathering. (App. at 25a.) However, the court below is incorrect in claiming that "[t]here is no conflict between that Court's opinion and the *theory* of our decision." (*Id.* at 26a; emphasis added.) A number of findings by the Tenth Circuit follow the opinions of this Court and are in direct conflict with the "theory" of the court below.

In direct conflict with the theory that Sections 4 and 5 override Section 1(b) and grant FERC explicit authority over gathering, the Tenth Circuit, citing opinions of this Court, looked to Section 1(b) alone as the source of FERC's jurisdiction and found that it is Section 1(b) which "defines FERC's jurisdiction." 905 F.2d at 1406, citing *F.P.C. v. Louisiana Power & Light Co.*, 406 U.S. 621, 636 (1972) (quoting *Panhandle Eastern Pipe Line Co. v. Public Service Comm'n*, 332 U.S. 507, 516 (1947)). The Tenth Circuit emphasized that "Congress confined FERC's jurisdiction *within the limits of section 1(b) . . . .*" *Id.* at 1407 (emphasis added).

In further conflict with the court below, the Tenth Circuit, citing *Colorado Interstate*, found that " 'under section 1(b) the Commission does not have express or implied rate-regulatory jurisdiction of the production and gathering of gas.' " *Id.* at 1406. The "split" reading of the NGA advanced by the court below, under which FERC would have "rate-regulatory" jurisdiction over gathering under Sections 4 and 5 but no certificate or abandonment jurisdiction

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[6] The Tenth Circuit stated that:

> If, upon proper application of the primary function test, the facilities are indeed exempt from Commission jurisdiction, whatever 'attractive gap' results was clearly created by Congress. Jurisdiction must already exist before the Commission can resort to analyzing its regulatory role by application of this theory.

Id.

over gathering facilities and activities under Section 7, is directly at odds with the Tenth Circuit's finding, based on opinions of this Court, that gathering is excluded from *all* aspects of FERC's jurisdiction, including "express or implied rate-regulatory jurisdiction." *Id.*

The court below bases its decision, in part, on preserving the "pro-competitive goals" of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. §3301 *et seq.* (App. at 20a.) This reliance on the NGPA is in direct conflict with the Tenth Circuit's finding that the NGPA made no change in Section 1(b)'s exclusion of gathering from FERC jurisdiction. 905 F.2d at 1407, n.9.

Under the theory of the court below, FERC's rate-regulatory jurisdiction does not extend to all gathering facilities, but, rather, FERC is authorized to single out only the gathering facilities of one particular type of owner/operator—interstate pipelines. (App. at 27a.) This selective jurisdiction theory is in direct conflict with the finding of the Tenth Circuit that "[t]he gathering exemption was not meant to attach only to certain owners/operators but to facilities." *Id.* at 1411. This finding of the Tenth Circuit follows the express language of Section 1(b), which provides a general exclusion for all gathering, without any limitation as to the particular type of owner/operator, and the opinions of this Court, which have viewed Section 1(b) as addressing the activity of gathering regardless of who is the owner/operator.

The Tenth Circuit emphasized that the mere fact that an interstate pipeline is the owner/operator of gathering facilities "cannot alone transform the character of these particular facilities" from nonjurisdictional to jurisdictional:

> [D]espite any possible showing that the facilities might perform gathering, the Commission would deem them jurisdictional because of the perceived primary transportation function; i.e., ultimately, the facilities are owned by and eventually connected to a company which *has as its primary function* the interstate transportation of gas.

> By taking Northwest's status into consideration as one factor, the Commission has, in fact, subsumed the primary function analysis within that factor. However, Northwest's status in interstate transportation cannot alone transform the character of these particular facilities.

Id. at 1410 (emphasis in original). In total opposition to the Tenth Circuit's finding, the theory of the court below allows the status of the owner/operator to "alone transform" nonjurisdictional gathering into a jurisdictional activity.

The court below finds that this case "involves interstate rates for which no local interest attaches and to which the states could not constitutionally or practicably exercise regulatory power." (App. at 28a-29a; footnote omitted.) In direct opposition to these claims, the Tenth Circuit found no merit to FERC's argument that state regulation of gathering was not possible, stating that "in other cases, FERC has approved the indirect regulation of gathering facilities, *see, e.g., Galaxy Energies, Inc.*, 21 F.E.R.C. ¶61,208 (1982)," and noting that FERC's "assertion that Colorado and Utah have no interest or an adverse interest in this regulation is speculative." 905 F.2d at 1412.

Finally, the reliance of the court below on FERC's policy arguments as to why it needs jurisdiction over gathering stands in marked contrast to the Tenth Circuit's recognition that "the 'express jurisdictional limitation on FERC's powers contained in § 1(b) of the NGA' . . . cannot be recast or obscured in the agency's attempt to formulate policy to protect the public interest and burner-tip consumer." *Id.* at 1407 (footnote omitted). "Unless Congress removes existing limitations on FERC's jurisdiction, the Agency's perception of national policy cannot establish or alter that jurisdiction which Congress has expressly granted." *Id.*

B. The D.C. Circuit Opinions in *AGA* and *Mobil*.

Subsequent to briefing and oral argument, Northern submitted to the court below the recent opinion in *American Gas Association v. F.E.R.C.*, 912 F.2d 1496 (D.C. Cir.

1990), *cert. denied*, 111 S. Ct. 957 (1991) (*AGA*). The findings of the court below are in direct conflict with findings in *AGA*.

As in the instant case, *AGA* addressed the issue of whether general language in Section 5 provides FERC with authority to regulate a nonjurisdictional area. The nonjurisdictional area at issue in *AGA* involved a particular non-price term ("take-or-pay" clause) in nonjurisdictional gas purchase contracts between producers and interstate pipelines, *i.e.*, contracts for "new" gas, which was removed from FERC jurisdiction by NGPA §§601(a)(1)(A) and (B), 15 U.S.C. §§3431(a)(1)(A) and (B). The D.C. Circuit explained that "petitioners isolate the words 'contract affecting such rate,' and argue that the Commission may assess the justness and reasonableness of the provisions of any contract that would likely influence a pipeline's end-of-the-pipeline charges . . . ." 912 F.2d at 1505. The D.C. Circuit found that the general language in Section 5 referring to "any . . . contract affecting such rate" did not provide authority for FERC to regulate nonjurisdictional areas because "[a]s we read the Natural Gas Act, the Commission was absolutely right: Congress clearly limited its §5 powers to jurisdictional contracts." *Id.* The D.C. Circuit's finding that FERC's Section 5 powers are limited to jurisdictional areas is in direct conflict with the finding of the court below that Sections 4 and 5 provide authority for FERC to regulate the nonjurisdictional area of gathering.

In direct conflict with the finding of the court below that FERC must control gathering rates because they affect end-users (App. at 20a), the D.C. Circuit specifically found that "[c]ontracts that 'affect' a rate indirectly, merely by affecting the costs that determine what pipeline sales rates are permissible under the NGA's 'just and reasonable' standard, are beyond §5's reach." 912 F.2d at 1506. As recognized by the D.C Circuit, accepting the argument that FERC has authority under the general language of Section 5 to regulate nonjurisdictional services would throw open the door to direct regulation of the rate

for legal services, building rental payments and any other costs which have an effect on interstate transportation, an approach which has "no conceptual core":

> Weighing against petitioners' theory is that logically it reaches pipelines' contracts for every other possible factor of production—even legal services. Petitioners themselves offer no distinction between these and gas contracts except as to the degree of impact on the pipelines' selling prices. That line, in contrast to the Commission's, has no conceptual core and thus seems awkward and implausible as a jurisdictional boundary.
>
> Accordingly, we find the Commission entirely correct in its premise that it lacks authority to modify even the non-price terms of nonjurisdictional contracts.

Id. at 1507. As with the Tenth Circuit in *Northwest*, the D.C. Circuit found that Section 1(b), not Section 4 or 5, contains the NGA's "basic grant of jurisdiction." *Id.* at 1506. The Eighth Circuit thus stands alone in asserting that jurisdiction over a distinct aspect of the natural gas industry, excluded by Section 1(b), somehow flows from Sections 4 and 5.

The opinion of the court below is based on an analysis of this Court's opinion in *Phillips* that is in direct conflict with that of the D.C. Circuit. The court below asserts that the instant case is comparable to this Court's opinion in *Phillips* based on the claim that *Phillips* involved "an overlap between a grant of authority and the § 1(b) exclusions" and "the granted power was held not to be subordinate to the exclusion." (App. at 24a.) This claim fails to recognize that *Phillips* involved the relationship between Section 1(b)'s grant of authority over sales for resale and its express exclusion for production and gathering. The instant case involves no grant of authority in Section 1(b); the only statutory directive at issue is Section 1(b)'s express exclusion with respect to gathering. As explained by the D.C. Circuit, the theory that Section 5 grants juris-

diction over a nonjurisdictional area "would make a nonsense" of this Court's opinion in *Phillips* because:

> On petitioners' view, *Phillips*'s narrow construction of the 'production or gathering' exemption was completely unnecessary for fulfillment of that intent; under § 5 the Commission would have had the authority to control wellhead rates merely because those rates are elements in the computation of pipelines' sales rates. Indeed, petitioners' theory is, more generally, an oxymoron—Commission jurisdiction over nonjurisdictional contracts.

912 F.2d at 1506.

The D.C. Circuit also noted that this Court's opinion in *F.P.C.* v. *Conway Corp.*, 426 U.S. 271 (1976), wherein it found that FERC "had a duty to consider whether the structure of a utility's jurisdictional (wholesale) and nonjurisdictional (retail) rates might impose a 'price squeeze' on the firms that bought from it at wholesale and sold in competition with it at retail," provided additional support for rejecting the claim that Section 5 grants jurisdiction over nonjurisdictional areas. 912 F.2d at 1506-07. The D.C. Circuit explained that "[i]n identifying a price squeeze, of course the Commission would have to *compare* nonjurisdictional with jurisdictional rates, but the Court was quite clear that '[t]he remedy, if any, would operate *only* against the rate for jurisdictional sales' " because " 'the Commission's power to set just and reasonable rates under § 206(a) [is] accordingly limited to sales "subject to the jurisdiction of the Commission" ' . . . ." *Id.* (footnote omitted; emphasis in original). Relying on *Conway*, the D.C. Circuit stated that "the potential impact of nonjurisdictional contracts' prices on the justness and reasonableness of jurisdictional rates provides no license for the Commission to monkey with the former." *Id.* at 1507.

As explained by the D.C. Circuit, the theory of the court below also is contrary to the Fifth Circuit's opinion in *Pennzoil Co.* v. *F.E.R.C.*, 645 F.2d 360 (5th Cir. 1981),

cert. denied, 454 U.S. 1142 (1982), wherein "[t]he court held that the Commission's authority to interpret (and nullify) price escalation clauses in contracts as to which the price increase could take effect only by a filing under § 4 of the NGA (i.e., jurisdictional contracts), did not give it any such interpretive or nullification authority over price escalation clauses in nonjurisdictional contracts." 912 F.2d at 1507. The D.C. Circuit explained that while "*Pennzoil* involves § 4, not § 5," the proponents of FERC jurisdiction had failed "to advance any logic supporting a far greater reach for the Commission under § 5." *Id.*

Acceptance of FERC's claim that it must extend jurisdiction over gathering by interstate pipelines for third parties because it is rendered "in connection with" transportation in interstate commerce also is contrary to the D.C. Circuit's finding in *Mobil Oil Corp.* v. *F.P.C.*, 463 F.2d 256 (D.C. Cir.), *cert. denied*, 406 U.S. 976 (1972). In *Mobil*, the D.C. Circuit rejected FERC's attempt to use policy reasons to justify regulation of royalty payments made by producers to landowners:

> Congress did not give the FPC carte blanche to take whatever action it might consider appropriate in furtherance of this purpose. The FPC is limited by the provision establishing its jurisdiction, and we do not find in that provision, rooted as it is in a sale in interstate commerce, any basis for reaching out to cover the landowner's lease or its royalty payments.

Id. at 263. Consistent with this Court's opinion in *Colorado Interstate*, the D.C. Circuit explained that while royalty payments were not subject to FERC rate regulation, FERC could determine the proper level of royalty costs, as well as other costs, included in the jurisdictional sales rates:

> [T]he FPC's jurisdiction over rates chargeable by a producer includes authority to determine the reasonableness of costs incurred, even though these are not subject to direct FPC control, and that establishes authority to review royalty pay-

ments, or drilling rig rentals, or any other element of the producer's cost of service.

Id. (footnote omitted).

III. THE COMMISSION HAS ASSERTED SELECTIVE JURISDICTION OVER GATHERING PROVIDED BY CERTAIN "NATURAL-GAS COMPANIES."

The theory of the court below relies on language in Sections 4 and 5 addressed to rates charged by "*any natural-gas company*," which includes producers selling natural gas for resale in interstate commerce. *Phillips*, *supra*. While a person making a sale of natural gas removed from FERC jurisdiction by the NGPA is not a "natural-gas company" subject to FERC regulation, Section 601(a)(1)(D), 15 U.S.C. §3431(a)(1)(D), a person making sales of natural gas which remain subject to FERC jurisdiction is a "natural-gas company" subject to FERC regulation. However, in asserting jurisdiction over gathering, FERC has done so on a selective basis limited to only one category of "natural-gas companies," interstate pipelines, ignoring completely those producers that are "natural-gas companies" and conduct gathering for other parties. Northern does not raise this argument in order to support a claim that FERC should assert jurisdiction over gathering by producers, but to further illustrate the lack of a statutory basis for FERC's attempt to assert jurisdiction over gathering by interstate pipelines.

Section 1(b) expressly provides a blanket exclusion from FERC jurisdiction to the service itself, "gathering of natural gas"; it is not limited to a particular type of operator and certainly does not authorize the discriminatory regulation of gathering service provided by some natural gas companies but not others. Further, the language of Sections 4 and 5 on which FERC relies does not support its attempt at discriminatory regulation. Such language refers to "*any*" natural gas company, without any distinction between interstate pipelines and producers.

The court below accepts FERC's attempt to explain away its discriminatory assertion of jurisdiction by relying

on NGPA Section 110(a), 15 U.S.C. §3320(a). (App. at 28a.) However, Section 110(a) relates only to the cost allowance for gathering that a producer may recover from a purchaser in a first sale, not to the rate for gathering service provided by a producer *for other producers* who make first sales but do not themselves conduct gathering.[7] Thus, Section 110(a) is inapplicable to the rate charged by a producer gathering gas *for other producers*; the rate for such service conducted by producer natural gas companies remains unregulated by FERC.

The court below also suggests that FERC's discriminatory treatment is "due to congressional action in excluding some sales from regulation under the NGPA." (App. at 28a.) However, regardless of whether the sale of the gas is excluded from regulation, gathering may be conducted by either an interstate pipeline or a producer "natural-gas company," *i.e.*, a producer which still sells gas subject to FERC jurisdiction, but FERC regulation is extended only to the former, not the latter.

The court below suggests that "there is a strong potential for anticompetitive abuses" in the case of an interstate pipeline that is not present in the case of producers. (*Id.*) This claim, however, is devoid of record support. Despite FERC's policy claim that regulation of gathering is necessary to prevent "discrimination" or "excessive" rates, FERC had before it no evidence whatsoever that Northern has discriminated in providing gathering service or that Northern's rates for gathering service are above, below or equal to the rates for comparable gathering service charged by gathering companies, intrastate pipelines or producers. In the competitive marketplace for

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[7] Pursuant to Section 110(a), the price received by a producer for a first sale of natural gas does not exceed the applicable ceiling price if the sales price exceeds the ceiling price to the extent necessary for the producer/seller to recover a cost allowance for gathering costs borne by the producer/seller in connection with its first sale. Section 110(a)(2), 15 U.S.C. §3320(a)(2).

gas which FERC seeks to establish, all companies which provide gathering, including interstate pipelines, have an incentive to keep their gathering rates competitive in order to maximize use of their gathering facilities.[8]

The court below fully endorses FERC's claim that it must have control over gathering to prevent an interstate pipeline from discriminating against third-party gas and in favor of its own system supply (App. at 19a-20a), but fails to recognize the enormous changes that have resulted from the fact that virtually all interstate pipelines, including Northern, are now "open access" transporters pursuant to the provisions of Order No. 436.[9] These provisions obligate pipelines to transport without discrimination, regardless of whether it involves third-party gas which results in a reduction in the pipeline's merchant role of selling system supply. As a consequence, Northern and many other interstate pipelines are now primarily transporters of third-party gas, with the incentive to maximize transportation of such volumes, not discriminate against them.

FERC's selective extension of regulation to gathering by interstate pipelines also fails to confront the discriminatory impact of that action on FERC's own efforts to create a competitive market for natural gas. To the extent FERC's regulation keeps Northern's gathering rates below

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[8] For example, the pressures of competition resulted in Northern negotiating a gathering rate of $0.1658 per MMBtu (App. at 59a), well below the $0.2202 per MMBtu maximum rate that Northern originally filed for informational purposes only (App. at 57a). FERC ultimately imposed a regulated ceiling price of $0.1471 per MMBtu. (App. at 58a.) The $0.1471 per MMBtu ceiling price is in fact the average rate that must be charged in order to recover all of the costs allocated by FERC to Northern's nonjurisdictional gathering for third parties. FERC's imposition of an average rate as a ceiling denies Northern the flexibility to charge a price higher than the average price, when competition permits, on extensive gathering facilities involving a higher cost, thereby affecting Northern's ability to recover the costs allocated to nonjurisdictional gathering.

[9] Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 50 Fed. Reg. 42,408 (Oct. 18, 1985), FERC Stats. & Regs., Regulations Preambles 1982-1985 ¶30,665 (1985).

the unregulated gathering rates charged by producers, gathering companies and intrastate pipelines, producers are able to obtain a higher price for their gas when Northern provides the gathering. For example, if the unregulated gathering rate in the competitive market is $0.16 per MMBtu, but Northern is forced to charge no more than $0.14 per MMBtu, producers can collect $0.02 per MMBtu more for their gas when Northern's gathering service is used than when unregulated gathering service is used because the total delivered price for the natural gas would remain the same.[10] Contrary to FERC's policy claim about protecting consumers, FERC's discriminatory assertion of jurisdiction based solely on the type of operator simply transfers $0.02 per MMBtu from the pipeline's gathering service, which is excluded from FERC regulation, to producers' pockets. This discriminatory impact cannot be squared with Congress' exclusion of gathering from FERC control, regardless of the type of operator.

IV. THE HOLDING BELOW EXTENDING FERC JURISDICTION TO AN INTERSTATE PIPELINE'S SEPARATELY INCORPORATED AFFILIATE ENGAGED SOLELY IN GATHERING IS CONTRARY TO EXPRESS STATUTORY LANGUAGE.

FERC's orders below do not claim that its jurisdiction extends to gathering performed by a separately incorporated company which is engaged solely in gathering, merely because it is affiliated with an interstate pipeline. Despite the fact that this question was not raised below, the court of appeals holds that FERC jurisdiction extends to gathering performed by an interstate pipeline's "parent, affiliate, subsidiary or lessors." (App. at 3a, n.2.) This sweeping holding, contained in a footnote, is not only contrary to the express language of Section 1(b) and the opinions of this Court, for the reasons discussed above, it is wholly unsupportable even under the theory that Sections 4 and 5 provide explicit authority to regulate gathering.

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[10] As noted above, Northern in fact negotiated a rate of $0.1658 per MMBtu in the competitive market prior to FERC's imposition of a $0.1471 per MMBtu ceiling. *See* footnote 8, *supra*.

The "in connection with" language of Sections 4 and 5 refers to rates charged by "any *natural-gas company*." 15 U.S.C. §§717c(a) and 717d(a) (emphasis added). An interstate pipeline's separately incorporated affiliate which conducts solely gathering is not a "natural-gas company" because "natural-gas company" is defined as a "person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." NGA Section 2(6), 15 U.S.C. §717a(6). A separately incorporated company is a "person" as that term is used in NGA Section 2(6), regardless of whether it is affiliated with an interstate pipeline, because " '[p]erson' includes an individual or a corporation." NGA Section 2(1), 15 U.S.C. §717a(1). Thus, a gathering rate charged by a separately incorporated company engaged solely in gathering, even if deemed to be "in connection with" subsequent jurisdictional transportation conducted by a separate corporation, is not a rate that is charged by a "natural-gas company" as defined by the express language of Section 2(6). Therefore, such company and its gathering rates are not covered by the theory that Sections 4 and 5 authorize regulation of gathering by a "natural-gas company" in connection with jurisdictional transportation.

The holding of the court below singles out certain gathering companies, based solely on their affiliation with an interstate pipeline, and denies them the opportunity to compete under the same terms as other gathering companies. Given the direct conflict with express statutory language, such holding should be reviewed by this Court.

CONCLUSION

For the reasons stated above, Northern respectfully prays that the Court grant this petition.

Respectfully submitted,

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July 2, 1991

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 88-1042, 88-2195 & 88-2588

Northern Natural Gas Company,
Division of Enron Corp.,

Petitioner,

vs.

Federal Energy Regulatory Commission,

Respondent.

Peoples Natural Gas Company, a division of UtiliCorp United Inc.; Texaco Inc., a Delaware Corporation; Exxon corporation, a New Jersey corporation; Amoco Production Company, a Delaware corporation; Mobil Oil Corporation; Mobil Producing Texas & New Mexico Inc; Mobil Exploration and Producing Southeast Inc.; Mobil Exploration and Producing North America, Inc.; ARCO Oil and Gas Company; Chevron U.S.A., Inc.; Phillips 66 Natural Gas Company; Northern States Power Company (Minnesota); Northern States Power Company (Wisconsin); and Minnesota Utilities,

Intervenors.

On Petition for Review of Orders of The Federal Energy Regulatory Commission

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Submitted: June 12, 1989

Filed: April 4, 1991

Before LAY, Chief Judge, BROWN**, Senior Circuit Judge, and WOLLMAN, Circuit Judge.

JOHN R. BROWN, Circuit Judge.

This is a procedurally complex case about a fairly straightforward question. Were it not for the inches-deep stack of briefs and records of a years-long controversy confronting us and earnestly urging contradictory applications of the same statute and caselaw, we might be tempted to give too simple an answer.

The question is whether the Federal Energy Regulatory Commission (FERC) may, in implementing its "Open Access Order No. 436,"[1] regulate the rates that natural gas

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* The Honorable John R. Brown, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

[1] Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 50 Fed. Reg. 42,408 (Oct. 18, 1985), FERC Stats. & Regs., Regulations Preambles 1982-1985 para. 30,665 (1985), (codified as amended in scattered sections of 18 C.F.R. Parts 2, 157, 284, 375, and 381) (final rule and statement of policy), *reh'g granted in part and denied in part*, Order No. 436-A, 50 Fed. Reg. 52,217 (1985), FERC Stats. & Regs., Regulations Preambles 1982-1985 para. 30,675; *reh'g granted in part*, Order No. 436-B, 51 Fed. Reg. 6,398 (1986), FERC Stats. & Regs. para. 30,688; *reh'g denied*, Order No. 436-C, 51 Fed. Reg. 11,566 (1986), 34 F.E.R.C. para. 61,404; *reh'g denied*, Order No. 436-D, 51 Fed. Reg. 11,569 (1986), 34 F.E.R.C. para. 61,405; *reconsideration denied*, Order No. 436-E, 51 Fed. Reg. 1,156 (1986), 34 F.E.R.C. para. 61,403; *vacated and remanded, Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied sub nom. Interstate Natural Gas Ass'n of Am. v. FERC*, 485 U.S. 1006, 108 S. Ct. 1468, 99 L.Ed.2d 698 (1988); *readopted on an interim basis on remand*, Order No. 500, 52 Fed. Reg. 30,334 (Aug. 14, 1987), FERC Stats. & Regs., Regulations Preambles para. 30,761, *extension granted*, Order No. 500-A, 52 Fed. Reg. 39,507 (Oct. 22, 1987), FERC Stats. & Regs., Regulations Preambles para. 30,770, *modified*, Order No. 500-B, 52 Fed. Reg. 39,630 (Oct. 23, 1987), FERC Stats. & Regs., Regulations Preambles para. 30,772, *modified further*, Order No. 500-C, 52 Fed. Reg. 48,986 (Dec. 29, 1987), FERC Stats. & Regs., Regulations Preambles para. 30,786 (1987), *modified further*, Order No. 500-D, 53 Fed. Reg. 8,439

pipeline companies charge third-party interstate transportation shippers for moving natural gas on gathering facilities owned by the pipeline.[2]

We conclude that the agency may regulate rates charged for transportation on the pipeline's own gathering facilities performed *in connection with* jurisdictional interstate transportation.

To trace our path to this conclusion, we must, as nearly always is so in the world, begin at the beginning.

The Word

FERC, which regulates interstate sales and transportation of natural gas under the Natural Gas Act of 1938 (NGA)[3] and the Natural Gas Policy Act of 1978 (NGPA)[4] adopted Order No. 436 on October 9, 1985, in response

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(Mar. 15, 1988), FERC Stats. & Regs., Regulations Preambles para. 30,800, *reh'g denied*, Order No. 500-E, 53 Fed. Reg. 16,859 (May 12, 1988), 43 F.E.R.C. para. 61,234, *modified further*, Order No. 500-F, 53 Fed. Reg. 50,924 (Dec. 19, 1988), FERC Stats. & Regs., Regulations Preambles para. 30,841 (1988), *reh'g denied*, Order No. 500-G, 54 Fed. Reg. 7,400 (Feb. 21, 1989), 46 F.E.R.C. para. 61,148 (1989), *remanded*, *American Gas Ass'n v. FERC*, 888 F.2d 136 (D.C. Cir. 1989), *readopted*, Order No. 500-H, 54 Fed. Reg. 52,344 (Dec. 21, 1989), FERC Stats. & Regs., Regulations Preambles para. 30,867 (1989) (Final Rule), *modified*, Order No. 500-I, 55 Fed. Reg. 6,605 (Feb. 26, 1990), FERC Stats. & Regs. para. 30,880 (1990), *aff'd in part and remanded in part*, *American Gas Ass'n v. FERC*, 912 F.2d 1496 (D.C. Cir. 1990), *cert. denied sub nom. Willcox v. FERC*, 59 U.S.L.W. 3562, 1991 U.S. LEXIS 1059 (Feb. 19, 1991) [hereafter Order No. 436].

[2] As used herein, the expression "gathering facilities owned by the pipeline" and all substantially similar expressions are intended to include such facilities owned or operated directly or indirectly by a pipeline or its parent, affiliate, subsidiary or lessors.

[3] 15 U.S.C. §§ 717-717z (1988).

[4] 15 U.S.C. §§ 3301-3432 (1988).

to changes in the industry which had been accelerated by the NGPA's alterations in the comprehensive regulatory scheme of the NGA,[5] including the removal of some price controls and the consequent unleashing of competitive forces. The NGPA's deregulatory provisions were generally designed to increase the role of market forces in the natural gas industry.[6]

Prior to the adoption of the NGPA, pipeline owners operated primarily as gas merchants, buying gas from producers at the wellhead and shipping it over their own pipelines for sale either to distributors (for resale in the market) or directly to commercial users.

One result of increased competition under the NGPA has been that shippers of gas seek "unbundled" transportation services from pipelines. As a gas merchant, a pipeline sold gas and transportation as a package, at the "bundled" sales rate. Today, pipelines still offer such bundled packages, but must also offer transportation service "unbundled" from the sale of gas. The contemporary unbundled-transportation customer is a distribution company or an end user who has purchased the gas directly from the producer or other seller at the wellhead. This "third party" gas competes in the market with gas the pipeline is offering to sell in a bundled package with transportation. Consequently, the Commission found in promulgating Order No. 436 that "the single most important economic

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[5] FERC regulation under the NGA includes control of market entry by issuing certificates of public convenience and necessity authorizing sale or transportation of natural gas (NGA § 7, 15 U.S.C. § 717f), and control of market exit by granting permission to abandon certificated service (*id.*). Regulation also includes control over the price and other terms of sales and transportation, to ensure that they are just and reasonable and non-discriminatory (NGA §§ 4 & 5, 15 U.S.C. §§ 717c and 717d).

[6] *See, e.g., Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409, 422, 106 S. Ct. 709, 716-17, 88 L.Ed.2d 732, 744 (1986).

change has been that natural gas has become a separate and distinct economic *commodity*."[7]

The Commission sought, in Order No. 436, to facilitate competition in the market for natural gas as a distinct commodity by encouraging pipelines to provide transportation without discriminating against customers whose gas would compete with the pipeline's gas in the market. Without some regulatory scheme, a pipeline could discriminate by refusing to provide transportation services for gas competing with its own, or by charging higher transportation rates for competing gas than for non-competing gas. Such discrimination, if unimpeded, would impair competition, virtually forcing customers to purchase gas from the pipeline at prices bundled with the price of transportation services.[8]

Thus, Order No. 436 streamlined the Commission's regulations regarding transportation certificates, while imposing an "open access" condition[9] which requires pipelines to provide transportation services without "undue discrimination or preference."[10] To take advantage of the streamlined certification rules, the pipeline may not refuse to transport "third party" gas purchased from a provider other than the pipeline.[11] In fixing transportation rates

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[7] Order No. 436, *supra* note 1, at 42,412 (emphasis in original).

[8] *Id.* at 42,421, 42,424.

[9] *Id.* at 42,493 (codified as amended at 18 C.F.R. § 284.8(b) (April 1, 1990)).

[10] *Id. See also id.* at 42,427: "sections 4 [15 U.S.C. § 717c(b)] and 5 [15 U.S.C. § 717d(a)] of the NGA also prohibit unduly discriminatory or preferential practices by natural gas companies"; *Mobil Oil Corp. v. FERC*, 886 F.2d 1023, 1026 n.7 (8th Cir. 1989): "FERC adopted Order No. 436 because it determined that the refusal of a pipeline to transport natural gas for a third party, where such transportation would displace the pipeline's own sales in its capacity as a gas merchant, was 'unduly discriminatory' under § 5 of the Natural Gas Act, 15 U.S.C. § 717d."

[11] *See* Order No. 436, *supra* note 1, at 41,421, 42,424-42,425, 42,430.

under this new regime, the pipelines are required to "separately identify cost components attributable to transportation, storage, and gathering costs."[12]

Consequently,

> Order No. 436 has restructured the role of interstate gas pipelines by opening the use of pipelines to third party gas sellers. . . . As restructured under open access, pipelines are to serve as transporters of natural gas not only for themselves but for others, even those who might be in competition with the pipeline in its role of gas merchant.[13]

These changes have given rise to questions regarding the distinction between gathering and interstate transportation and the regulation thereof under the provisions of the NGA.

Gathering and interstate transportation are specifically distinguished in § 1(b) of the NGA:[14]

> *The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce*, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies en-

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[12] *Id.* at 42,493 (codified as amended at 18 C.F.R. § 284.7(d)). The rule also requires that "any rate filed for service subject to this section must be a one-part rate that recovers the costs allocated to the service . . . ." *Id.*

[13] *Mobil Oil Corp. v. FERC*, 886 F.2d 1023, 1025 (8th Cir. 1989).

The order has spawned much controversy, as evidenced by its subsequent history, detailed *supra*, note 1. That history includes three remands for further proceedings by the Court of Appeals for the D.C. Circuit, which generally, however, upheld the order's substance. Those remands do not relate to the issue addressed here.

[14] 15 U.S.C. § 717(b).

> gaged in such transportation or sale, but *shall not apply to any other transportation* or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution *or to the production or gathering of natural gas.*[15]

Sections 4(a) and (b) of the NGA[16] also have a significant role in defining the Commission's authority:

> (a) *All rates and charges* made, demanded, or received by any natural-gas company *for or in connection with the transportation or sale* of natural gas *subject to the jurisdiction of the Commission* . . . shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.
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> (b) No natural-gas company shall, *with respect to any transportation or sale* of natural gas *subject to the jurisdiction of the Commission*, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.[17]

Section 4(c)[18] requires natural gas companies to file "[u]nder such rules and regulations as the Commission may prescribe . . . all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges . . . ."[19]

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[15] *Id.* (emphasis added).

[16] 15 U.S.C. § 717c(a) and (b).

[17] *Id.* (emphasis added).

[18] 15 U.S.C. § 717c(c).

[19] *Id.*

Section 4(d)[20] requires 30 days notice by a natural gas company of a rate change unless the Commission for good cause shown allows, by order, a faster change.[21]

Section 4(e)[22] grants the Commission the authority to "enter upon a hearing concerning the lawfulness" of proposed rates, permits the Commission to temporarily suspend a rate schedule "pending such hearing," and authorizes the Commission "after full hearings" to make "proper" orders regarding such rates. The burden is placed on the natural-gas company to show that increased rates are "just and reasonable."[23]

Section 5(a)[24] provides:

> (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that *any rate, charge* or classification demanded, observed, charged, or collected by any natural-gas company *in connection with* any transportation or sale of natural gas, *subject to the jurisdiction* of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice or contract to be thereafter observed and in force, and shall fix the same by order. . . . [T]he *Commission may order a decrease where existing rates are*

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[20] 15 U.S.C. § 717c(d).

[21] *Id.*

[22] 15 U.S.C. § 717c(e).

[23] *Id.*

[24] 15 U.S.C. § 717d(a).

> *unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.*[25]

Gathering, which § 1(b) generally exempts from the provisions of the act, can be performed by a producer, by a pipeline (interstate or intrastate), or by an independent gathering firm. The term "gathering" refers to the process of collecting gas at the point of production (the wellhead) and moving it to a collection point for further movement through a pipeline's principal transmission system.[26] It should be pointed out, however, that the flow of the gas "is continuous from the well head to the ultimate consumer."[27] This is especially significant in this case where the gathering is performed by an interstate pipeline over its own facilities in connection with continuing interstate transportation by the same pipeline.

"Transportation" involves the movement of gas through a pipeline's principal transmission system. Transportation facilities which receive natural gas after gathering may conduct transportation in interstate commerce, which is subject to the Commission's jurisdiction under § 1(b), or transportation in intrastate commerce, which is excluded from regulation under the NGA.

The NGA provides that tariffs are to be filed "[u]nder such rules and regulations as the Commission may prescribe . . . and in such form as the Commission may designate."[28] The Commission is also granted "the power to . . . prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or

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[25] *Id.* (emphasis added).

[26] *See, e.g., EP Operating Co. v. FERC*, 876 F.2d 46 (5th Cir. 1989) for a more thorough discussion of the characteristics of a gathering facility.

[27] 8 H. Williams & C. Meyers, OIL AND GAS LAW 406-07 (1987).

[28] NGA § 4(c).

appropriate to carry out the provisions of this chapter."[29] We have recognized that "an agency's interpretation of the statute that it is charged with administering is entitled to considerable deference."[30] " '[A] court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of the agency.' "[31] Thus we should uphold the Commission's orders if they are not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[32]

The three consolidated appeals now before us arise from this regulatory scenario.

The Score

Sometimes one cannot tell the *players* without a scorecard. In this case, such resort is necessary just to determine the answer to the more obvious and basic question of the *score.*

The Long and Winding Road

Northern Natural Gas Company is a pipeline company operating an integrated, interstate pipeline system. Some of the services it offers include:

1) sales for resale in interstate commerce of natural gas which Northern has purchased (sale by Northern is

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[29] NGA § 16, 15 U.S.C. § 717o.

[30] *Groseclose v. Bowen*, 809 F.2d 502, 505 (8th Cir. 1987), (citing *Young v. Community Nutrition Institute*, 476 U.S. 974, 980, 106 S. Ct. 2360, 2365, 90 L.Ed.2d 959, 966 (1986)).

[31] *Groseclose*, 809 F.2d at 505 (citing *Young*, 476 U.S. at 980, 106 S. Ct. at 2364, 90 L.Ed.2d at 966 (quoting *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44, 104 S. Ct. 2778, 2781-82, 81 L.Ed.2d 694, 703 (1985))); *Springdale Memorial Hosp. Assn., Inc. v. Bowen*, 818 F.2d 1377, 1380 (8th Cir. 1987); *Missouri Pub. Serv. Comm'n v. ICC*, 763 F.2d 1014, 1017 (8th Cir. 1985).

[32] Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (1988).

"bundled" with transportation, gathering and other connected services);

2) direct sales ("bundled" with transportation and gathering and other connected services) to end users, of natural gas which it has purchased;

3) collecting, at the point of production (the wellhead), natural gas owned by others, and moving the gas over Northern's gathering facilities to a collection point for further movement through its principal transmission ("transportation") facilities; and

4) transportation in interstate commerce, through its principal transmission facilities, of natural gas owned by others.

It is the fourth service that Order No. 436 is intended to protect from discrimination which would benefit the pipeline's sale of its own gas to the disadvantage of the other, third-party shippers.

These proceedings began with a 1985 transportation tariff filing. On April 11 of 1986, Northern filed with the Commission a proposed settlement negotiated with third-party shippers who had challenged that 1985 filing. The settlement offer included an open access transportation proposal under Order No. 436,[33] but included no statement of Northern's charges to interstate transportation customers for gathering performed by Northern on its own facilities in connection with the jurisdictional interstate transportation.

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[33] *See Northern Natural Gas Co.*, 36 F.E.R.C. para. 63,024 at 65,083, 65,085-87 (July 17, 1986) (ALJ's Certification to Commission of Contested Offer of Settlement); *Northern Natural Gas Co.*, 37 F.E.R.C. para. 61,272 at 61,812 (December 22, 1986) (Commission's Order Approving Contested Settlement as Modified).

In a December 22, 1986 order,[34] the Commission approved the transportation proposal (with some modifications which are not at issue here), but with the specific requirement that Northern separately state its gathering rates in its tariff sheets.[35] The Commission emphasized that:

> Order No. 436 specifically requires the separate identification of gathering costs. Moreover, there is no record to determine whether the subject services are gathering. However, without rendering an opinion on the question of jurisdiction at this time, we believe it is consistent with Order No. 436 to modify the Settlement to provide that Northern shall reflect its gathering rates in its tariff sheets.[36]

Northern petitioned for rehearing,[37] contending that the Commission had no jurisdiction to impose the requirement that gathering rates be stated in the tariff.

The Commission affirmed the relevant part of its earlier order on November 9, 1987,[38] stating that "section 284.7(d)(1) of the Commission's regulations[39] provides that

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[34] *Northern Natural Gas Co.*, 37 F.E.R.C. para. 61,272 (December 22, 1986) (Commission's Order Approving Contested Settlement as Modified).

[35] *Id.* at 61,812-13: "Both staff and the indicated shippers point out that Northern failed to include in its Settlement, a separately stated rate for gathering service in conjunction with its open access transportation services . . . . "

[36] *Id.* (footnote omitted).

[37] On January 21, 1987.

[38] *Northern Natural Gas Co.*, 41 F.E.R.C. para 61,158 (November 9, 1987) (Commission's Order Granting in Part and Denying in Part Rehearing and Granting Clarification).

[39] 18 C.F.R. § 284.7(d)(1) (1987) [footnote as in original]. Section 284.7(d)(1) provides:

rates for open access transportation separately identify costs attributable to transportation, storage and gathering."[40] The Commission reiterated its statement that it is "consistent with Order No. 436" to require Northern to state a gathering rate "so that shippers can be apprised of the total cost of services they plan to purchase."[41] The Commission also reiterated that there was no record to determine whether the services at issue actually consisted of gathering or of transportation. The Commission addressed jurisdiction no further but concluded with a statement which Northern interpreted as an assertion of jurisdiction to regulate gathering rates under the "just and reasonable" standards of NGA §§ 4 and 5: "The Commission, however, is *unable to determine the lawfulness* of Northern's gathering rates until it files revised tariff sheets in compliance with this order."[42]

On November 27, 1989, Northern filed with the Commission a tariff which complied with the orders by stating gathering rates, but included a footnote which stated that the gathering rates were listed for information purposes only, that Northern reserved the right to change the rates, and that Northern did not imply consent to or recognition of Commission jurisdiction over gathering rates.[43]

> (d) Rate design —(1) Volumetric rates. Except as provided in § 284.8(d), any rate filed for service subject to this section must be a one-part rate that recovers the costs allocated to the service . . . . Such rate must separately identify cost components attributable to transportation, storage and gathering costs.

[40] *Northern Natural Gas Co.*, 41 F.E.R.C. para. 61,158 at 61,399 (November 9, 1987) (Commission's Order Granting in Part and Denying in Part Rehearing and Granting Clarification) (footnote omitted).

[41] *Id.* (footnote omitted).

[42] *Id.* (emphasis added).

[43] Northern's Original Sheet No. 4g.3 as filed November 27, 1987 reads:

While awaiting the Commission's decision on this compliance filing, Northern filed a petition for review[44] by this Court of the Commission's previous two orders to state gathering rates.[45] We held Northern's appeal in abeyance pending the Commission's decision on the supposed jurisdictional issue.

In a January 28, 1988 letter order[46] the Commission staff's Director of the Office of Pipeline and Producer Regulation rejected the tariff filing (see note 38, *supra*) as not in compliance with the two previous orders to state gathering rates. The Director, rejecting the filing, stated that the footnote was in "direct contravention of the Commission's requirement that rates charged under the open-access program be stated rates . . . . Northern's gathering rates have not been derived from the costs allocated to or the representative volumes associated with gathering service . . . . Accordingly, Northern's rate derivation must be revised."[47]

CURRENTLY EFFECTIVE RATES

	Charge Per MMBtu Per Gathering System	
	Minimum	Maximum
Field Gathering[1]	$ .0150	$ .2202

[1] Reflects Northern's gathering cost of service. Provided for informational purposes only and not as a limitation of prices which may be charged or to imply recognition of or assent to Commission jurisdiction over such activities.

[44] The petition was docketed as *Northern Natural Gas Co. v. FERC*, No. 88-1042.

[45] *Northern Natural Gas Co.*, 37 F.E.R.C. para. 61,272 (December 22, 1986) (settlement modification), and 41 F.E.R.C. para. 61,158 (November 9, 1987) (rehearing denied).

[46] *Northern Natural Gas Co.*, Ltr. Order, Docket No. RP85-206-030, (January 28, 1988) (Office of Pipeline and Producer Regulation).

[47] *Id.*

Northern appealed this order to the Commission,[48] again relying on § 1(b), and on the same date, to comply with OPPR's letter order, filed a tariff with revised gathering rates[49] and without the footnote. The Commission accepted this tariff by letter order issued April 14, 1988[50] without prejudice to Northern's appeal of the director's action. Northern then requested rehearing of the April 14 order approving the tariff. Northern's appeal of the director's rejection of the first tariff and its request for rehearing on the Commission's approval of the second tariff (see note 43, *supra*) continued to press Northern's objections to Commission jurisdiction to require it to file gathering rates as part of its jurisdictional transportation tariff, and to determine their lawfulness.

The Commission responded to Northern's February 26 Appeal From Staff Action (appealing OPPR's January 28 rejection of the tariff with the footnote, duplicated in note 38, *supra*) and its Request for Rehearing on the Commission's April 14 order (appealing the Commission's acceptance of the tariff with the footnote removed, duplicated

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[48] Appeal from Staff Action, Docket No. RP85-206-030 (February 26, 1988).

[49] Northern's Original Sheet No. 4g.3 as filed February 26, 1988 reads:

CURRENTLY EFFECTIVE RATES

	Charge Per MMBtu Per Gathering System	
	Minimum	Maximum
Field Gathering	$ .0100	$ .1471

This revised tariff was accompanied by a transmittal letter stating the changes were made under compulsion of the OPPR letter order.

[50] *Northern Natural Gas Co.*, 43 F.E.R.C. para. 61,158 (April 14, 1988).

in note 43, *supra*) in one June 15, 1988 Order Denying Appeal of Staff Action and Denying Rehearing.[51]

In the June 15 order, the Commission set forth its position on the Commission's jurisdiction to determine the lawfulness of Northern's gathering rates.

The Commission decided that "[e]ven assuming that Northern's service is gathering, the Commission has the *jurisdiction* to determine the justness and reasonableness of the rates, terms and conditions under which the gathering service is performed"[52] under §§ 4 and 5 of the NGA.[53] The Commission stated that, at most, the § 1(b) gathering exemption would exempt Northern's gathering service from the Commission's certificate jurisdiction under § 7[54] of the NGA.[55]

Northern appealed the June 15 order to this court. Uncertain, however, whether the order constituted appealable final action for purposes of our review, Northern also filed a petition with the Commission for another rehearing. We held the appeal in abeyance, pending the outcome of the administrative petition for rehearing. The Commission denied rehearing on September 22, 1988,[56] and Northern appealed that decision to this Court. We consolidated the appeals from the June 15 and September 22 orders with the first appeal.

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[51] *Northern Natural Gas Co.*, 43 F.E.R.C. para. 61,473 (June 15, 1988).

[52] *Id.* at 62,160 (emphasis added).

[53] 15 U.S.C. §§ 717c and 717d.

[54] 15 U.S.C. § 717f.

[55] *Northern Natural Gas Co.*, 43 F.E.R.C. para. 61,473 at 62,160 (June 15, 1988).

[56] *Northern Natural Gas Co.*, 44 F.E.R.C. para. 61,384 (September 22, 1988).

Where Does it Lead?

Given this factual and regulatory scenario as a starting point, we address these consolidated appeals with one discussion of one question: May the Commission, under the NGA's §§ 4 and 5, regulate rates charged for gathering on the pipeline's own gathering facilities in connection with jurisdictional interstate transportation, notwithstanding the explicit § 1(b) exclusion of gathering from the act?

The Commission points out the Supreme Court's admonition that "[e]xceptions to the primary grant of jurisdiction in the section [1(b)] are to be strictly construed"[57] so that the broad purposes of the Act will not be compromised. This consideration provides an anchor for our analysis.

Colorado Interstate

Both parties rely upon *Colorado Interstate Gas Co. v. FPC*.[58] The relevant holding was that the NGA "does not preclude the Commission from reflecting the production and gathering facilities of a natural gas company in the rate base and determining the expenses incident thereto for the purposes of determining the reasonableness of [sales] rates subject to its jurisdiction."[59] The Commission asserts that the present order is no different from the orders upheld in *Colorado Interstate*. We agree that it is not substantively different from the orders upheld in that case. For the Commission to regulate separately stated rates for gathering over the pipeline's own gathering lines performed *in connection with* further jurisdictional inter-

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[57] *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 679, 74 S. Ct. 794, 797-98, 98 L.Ed. 1035, 1046 (1954) (quoting *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682, 690-691, 67 S. Ct. 1482, 1486-87, 91 L.Ed. 1742, 1748 (1947)).

[58] 324 U.S. 581, 65 S. Ct. 829, 89 L.Ed. 1206 (1945).

[59] *Id.* at 603, 65 S. Ct. at 839, 89 L.Ed. at 1223.

state transportation is the substantial equivalent of the control of rates for gathering upheld in *Colorado Interstate*. Section 1(b) grants jurisdiction over interstate transportation and over interstate sales in the same words. This is the basis of the Commission's most powerful argument, which we accept fully: Since *Colorado Interstate* permits the regulation of rates for gathering performed in connection with interstate sales, it would be inconsistent to hold that the Commission may not regulate rates for transportation over a pipeline's own gathering facilities performed in connection with admittedly jurisdictional interstate transportation.

A Closer Look

Colorado Interstate Gas Co. and affiliated companies objected to accounting methods used by the Commission in setting the companies' rates for jurisdictional interstate sales of natural gas.

One aspect of the Colorado companies' complaint was that the Commission included all of their costs, including the costs of gathering, in setting the jurisdictional interstate sales rates. The companies argued that by adding a 6.5 percent return to *all costs* in setting an interstate sales rate, the Commission was effectively regulating rates for gathering, contrary to the provisions of § 1(b). The companies wanted the Commission to allow in operating costs the "fair field price" or "fair market value, as a commodity, of the gas"[60] at the time it entered the interstate transmission lines.[61] Adding the same return to the market value at that point rather than to actual costs would of course produce a higher rate. The Court reiterated its statement from *FPC v. Hope Natural Gas Co.*[62] that "value

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[60] *Id.* at 600, 65 S. Ct. at 838, 89 L.Ed. at 1222.

[61] *Id. See also Colorado Interstate Gas Co. v. FPC*, 142 F.2d 943, 955-56 (1944), *aff'd*, 324 U.S. 581, 65 S. Ct. 829, 89 L.Ed. 1206 (1945).

[62] 320 U.S. 591, 64 S. Ct. 281, 88 L.Ed. 333 (1944).

is 'the end product of the process of rate-making not the starting point.' "[63]

The Court held that considering gathering costs in setting a sales rate was not precluded by § 1(b).[64] Of course the Commission-approved sales rate was affected by the gathering rate the companies charged because the gathering charge was "bundled" into the sales rate. Therefore it would not be possible to set a sales rate without effectively including a gathering charge.

The Court held that the *result produced by the Commission's method was the same as could be produced* by the method preferred by the companies,[65] and reiterated its holding in *Hope* that it is "the result reached not the method employed which is controlling. . . . It is not theory but the impact of the rate order which counts."[66]

The Commission promulgated Order No. 436 to curtail "undue preference[s] . . . prejudice[s] or disadvantage[s]"[67] in interstate transportation and sales.[68] Such discrimination by pipelines is forbidden by NGA § 4(b) in both interstate transportation and sales.

Permitting a pipeline to manipulate the otherwise unregulated charges for gathering services performed over its own facilities in connection with jurisdictional interstate transportation, would, in effect, permit the *pipeline* to establish rates for the interstate transportation. Thus, the pipeline could grant forbidden preferences in interstate transportation for its own gas, to the disadvantage of third-

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[63] *Colorado Interstate*, 324 U.S. at 601, 65 S. Ct. at 838, 89 L.Ed. at 1222 (citation omitted).

[64] *Id.* at 603, 65 S. Ct. at 839-40, 89 L.Ed. at 1223.

[65] *Id.*

[66] 320 U.S. at 602, 64 S. Ct. at 288, 88 L.Ed. at 345.

[67] NGA § 4(b).

[68] Order No. 436, *supra* note 1, at 42,424.

party shippers. By setting transportation rates at levels which give an advantage to the pipeline's own gas, while making the total transportation charges incurred by third-party shippers so high as to render their gas sales prices non-competitive, the pipeline can also create an "undue preference or advantage"[69] for its own jurisdictional interstate gas sales to the "undue prejudice or disadvantage"[70] of the interstate gas sales of third-party shippers.

The detrimental effects of these undue preferences reach beyond the third-party shippers. The public, the ultimate consumer, suffers from the reduced competition in the interstate sale of natural gas. This defeats the Commission's purpose in promulgating Order No. 436, and is contrary to the purposes and explicit provisions of the NGA and the pro-competitive goals of the NGPA.

The Supreme Court addressed just this potential in *Interstate Natural Gas Co. v. FPC*,[71] stating that "unreasonable charges exacted at this [gathering] stage of the interstate movement become perpetuated in large part in fixed items of cost which must be covered by rates charged subsequent purchasers of the gas, including the ultimate consumer. It was to avoid such situations that the Natural Gas Act was passed."[72]

Regulatory Gap

The Supreme Court in *FPC v. Transcontinental Gas Pipe Line Corp.*[73] (*Transco*), said that in resolving borderline cases not covered by explicit congressional au-

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[69] NGA § 4(b).

[70] *Id.*

[71] 331 U.S. 682, 67 S. Ct. 1482, 91 L.Ed. 1742 (1947).

[72] *Id.* at 693, 67 S. Ct. at 1488, 91 L.Ed. at 1749-50 (footnote omitted).

[73] 365 U.S. 1, 81 S. Ct. 435, 5 L.Ed.2d 377 (1961).

thority, the comprehensive regulatory scheme[74] of the NGA dictates that "we must ask whether State authority can practicably regulate a given area and if we find that it cannot, then we are impelled to decide that federal authority governs."[75] The issue at hand, however, is covered by explicit congressional authority.

Our statutory construction of the Commission's power is therefore properly guided not by the regulatory gap theory, but by the admonition in *Phillips Petroleum Co. v. Wisconsin*,[76] that "[e]xceptions to the primary grant of jurisdiction in the section [1(b)] are to be strictly construed."[77]

What Is Excluded From FERC Regulation by § 1(b)?

In *Interstate Natural Gas Co. v. FPC*,[78] the Supreme Court held that the § 1(b) gathering exclusion could not exempt a company's jurisdictional sales for resale in interstate commerce.

Giving full play to the § 1(b) exemption of gathering, the Court confined it to matters of state and local concern: "Clearly, among the powers thus reserved to the States is the power to regulate the *physical production and gathering of natural gas* in the interests of conservation or any other consideration of legitimate local concern."[79]

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[74] *Id.* at 28, 81 S. Ct. at 449-50, 5 L.Ed.2d at 394.

[75] *Id.* at 19-20, 81 S. Ct. at 445, 5 L.Ed.2d at 390.

[76] 347 U.S. 672, 745 S. Ct. 794, 98 L.Ed.2d 1035 (1954).

[77] *Id.* at 679, 745 S. Ct. at 797, 98 L.Ed. at 1046 (quoting *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682, 690-91, 67 S. Ct. 1482, 1487, 91 L.Ed. 1742, 1748 (1947)).

[78] 331 U.S. 682, 67 S. Ct. 1482, 91 L.Ed. 1742 (1947).

[79] *Id.* at 690, 67 S. Ct. at 1487, 91 L.Ed. at 1748 (emphasis added) (footnote omitted).

In *FPC v. Panhandle Eastern Pipe Line Co.*,[80] which involved an attempt by the Commission to prevent a transfer of gas leases, the Court held that the gathering and production exemptions applied to producing and gathering *facilities*, including leases.

In *Northern Natural Gas Co. v. State Corporation Comm'n*,[81] the Supreme Court explicitly held that the gathering and production exemptions of § 1(b) are limited to the physical activities of gathering and production. The Court stated, "[i]n a line of decisions beginning with *Colorado Interstate Gas Co. v. Federal Power Com.* . . . and *Interstate Natural Gas Co. v. Federal Power Com.* . . . , it has been consistently held that 'production' and 'gathering' are terms narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution."[82]

Our decision today is narrowly confined to rates for gathering by an interstate pipeline over its own lines in connection with jurisdictional interstate transportation. Neither gathering facilities nor the physical activity of gathering is affected.

No Support for Northern's Position

Northern cites and quotes from numerous other cases for the proposition that the Commission may never regulate any gathering rates. Although the § 1(b) exclusion of gathering is frequently discussed, on close examination none of the cases supports Northern's position.

Northern quotes the Supreme Court in *Panhandle Eastern Pipe Line Co. v. Public Serv. Comm'n*:[83]

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[80] 337 U.S. 498, 69 S. Ct. 1251, 93 L.Ed. 1499 (1949).

[81] 372 U.S. 84, 83 S. Ct. 646, 9 L.Ed.2d 601 (1963).

[82] *Id.* at 90-91, 83 S. Ct. 649-50, 9 L.Ed.2d at 606 (citations omitted).

[83] 332 U.S. 507, 68 S. Ct. 190, 92 L.Ed. 128 (1947).

> Three things and three things only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.[84]

The Court in *Panhandle* upheld State power to regulate direct industrial sales. The scope of the Commission's power under the inclusive "in connection with" language of §§ 4 and 5 was not at issue. The quoted passage continues:

> The omission of any reference to other sales, that is, to direct sales . . . was not inadvertent. . . .
>
> The line of the statute was thus clear and complete. It cut sharply between sales for resale and direct sales for consumptive uses.[85]

The clear and complete line cutting sharply between direct sales and sales for resale is not the aspect of the statute at issue here as it was in *Panhandle*. In the case at hand, we address the nexus between the § 1(b) exclusion of gathering and the §§ 4 and 5 authority to regulate services in connection with jurisdictional transportation. *Panhandle* involved no such nexus or overlap between authority granted and that withheld. Thus, the language Northern quotes out of context is not helpful to us.

The *Panhandle* Court did, however, emphasize the congressional purpose, in enacting the NGA, of creating a comprehensive regulatory scheme with both federal and

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[84] *Id.* at 516-17, 68 S. Ct. at 195, 92 L.Ed. at 137.

[85] *Id.*

state spheres of authority.[86] The scheme created no conflict or no man's land between state and federal authority. As in that case, "The attractive gap which appellant has envisioned in the coordinate schemes of regulation is a mirage,"[87] and Northern's rates are subject to regulation.

A case entirely unhelpful to Northern is *Phillips Petroleum Co. v. Wisconsin.*[88] In that case, the Supreme Court imposed NGA price controls on the wellhead sales for resale in interstate commerce of independent producers. Prior to *Phillips*, many—in and out of government and the gas industry—thought that the NGA was to apply only to interstate pipelines and that the Commission could not regulate the interstate sales of producers because of the production exemption. In *Phillips* then, as here, there was an overlap between a grant of authority and the § 1(b) exclusions. There, as is appropriate here, the granted power was held not to be subordinate to the exclusion.

> Northern cites the following language from *Mobil Oil Corp. v. FPC*:[89]
>
> As this Court has noted, however, "Congress did not give the FPC *carte blanche* to take whatever action it might consider appropriate in furtherance of" the objectives of the Act. The Commission cannot gain jurisdiction over an activity simply by characterizing it as part of a "total transaction" of which another part happens to be subject to the FPC's control.[90]

First, *Mobil* involved the Commission's assertion of jurisdiction to set rates for transportation of liquid hydro-

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[86] *Id.* at 517, 520, 68 S. Ct. at 195-96, 92 L.Ed. at 138, 139.

[87] *Id.* at 523, 68 S. Ct. at 198-99, 92 L.Ed. at 141.

[88] 347 U.S. 672, 74 S. Ct. 794, 98 L.Ed. 1035 (1954).

[89] 483 F.2d 1238 (D.C. Cir. 1973).

[90] *Id.* at 1248.

carbons, which are not in any way subject to the NGA's comprehensive scheme.

More significant, the Commission has by its orders and regulations demonstrated that "in connection with" interstate transportation, regulation of the charges made by the pipeline for gathering over its own facilities is essential to prevent discrimination against third-party gas in interstate transportation and sales.

This precisely overcomes the negative implication of the words in *Mobil*. The Court there said:

> *We are not confronted with a case where the Commission has demonstrated that rate jurisdiction* over liquids *is necessary to preserve its rate jurisdiction over natural gas.*[91]

Jurisdiction over rates for gathering, when performed by an interstate pipeline over its own facilities in connection with jurisdictional interstate transportation, *is* necessary to preserve the Commission's §§ 4 and 5 responsibility to prevent discrimination against shippers who must depend on monopolistic pipelines for transportation.

In the Tenth Circuit

All of the arguments presented to us were recently urged on the Court of Appeals for the Tenth Circuit in *Northwest Pipeline Corp. v. FERC*.[92] The Court in *Northwest*, however, expressly declined to address the argument that §§ 4 and 5 of the NGA grant FERC any authority over charges for gathering.[93]

In that case, the Commission had determined that the facilities at issue were interstate transportation facilities

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[91] *Id.* at 1247, 1249 (footnote omitted) (emphasis added).

[92] 905 F.2d 1403 (10th Cir. 1990).

[93] *Id.* at 1411 n.23.

subject to its rate regulatory jurisdiction under § 1(b). Here, however, the Commission found it unnecessary to determine whether Northern's facilities are gathering facilities as such or interstate transportation facilities, because it asserted the right to regulate the rates "even assuming" the facilities are gathering facilities as referred to in § 1(b).

Declining to address the Commission's §§ 4 and 5 argument, the Court in *Northwest* simply reversed and remanded because of the Commission's failure to apply its own "primary function test" in determining whether the facilities were interstate transportation facilities or gathering facilities.

There is no conflict between that Court's opinion and the theory of our decision. We determine precisely the issue that Court declined to decide. We do not wait for the Commission to determine finally whether the pipeline's facilities are or are not § 1(b) gathering facilities.

The Importance of Being Direct

Much energy is expended by the parties in arguing whether the Commission is indirectly regulating gathering charges here, as in *Colorado Interstate*, or directly regulating. While the Commission acts more directly on the gathering rates at issue here, it acted on gathering charges in *Colorado Interstate* by setting sales rates for which charges for gathering necessarily had to be considered.

It doesn't matter. The distinction between the direct and indirect action is a formalism which is not related to the Congressional grants of authority of the NGA or the holding in *Colorado Interstate*. It does not imply, nor does *Colorado Interstate* stand for the proposition that, for the Commission to properly regulate rates for gathering over the pipeline's own facilities in connection with jurisdictional transportation, it must do so only in some indirect manner. The "in connection with" language of §§ 4 and 5 indicates that Congress, in devising the regulatory scheme, did not

draw a formalistic line between direct and indirect regulation. The Congress foresaw the Commission's need for the ability to regulate other aspects of the natural gas industry as necessary to make effective its primary control over interstate transportation and sales. The §§ 4 and 5 grant of authority to regulate "in connection with" interstate sales and transportation is not a grant of authority to regulate only by indirect means.

Under the circumstances of this case, which are nearly identical to those of *Colorado Interstate*, § 1(b) does not forbid the Commission from more directly exercising the authority granted in §§ 4 and 5. It is insignificant that transportation rather than sale is the service involved or that the rate for gathering is to be stated separately rather than "bundled." Stating the gathering rate separately from the related jurisdictional transportation rate does not magically "unbundle" the actual gathering activity performed over the pipeline's own facilities in connection with continuing interstate transportation.

Selective Regulation

While carefully avoiding an explicit charge that there is a denial of constitutionally required Equal Protection in the regulatory scheme of the NGA and the NGPA, Northern comes close. Northern complains that the Commission's exercise of authority to regulate its gathering rates was selective in that interstate pipelines, but not producers or independent gatherers, are covered.

The question is not before us of whether gathering performed by producers or independent gatherers for transportation in interstate commerce by an interstate pipeline is sufficiently connected to interstate transportation to justify rate regulation under §§ 4 and 5. We need not decide.

The Commission explains why its orders here do not, as asserted by Northern, constitute discriminatory treatment of pipelines.

First, the Commission explains, producers and others making "first sales" under § 2(21) of the NGPA,[94] *are* subject to separate regulations under § 110 of the NGPA,[95] covering production-related costs. Therefore it is not correct to say that gathering by producers is not subject to any regulatory scrutiny. Also, where producers' sales (including gathering) are not subject to regulatory controls, it is due to congressional action in excluding some sales from regulation under the NGPA.

Further, there is strong potential for anticompetitive abuses where the company performs both the gathering and the transportation, which do not exist for independent gatherers or producers. Where the gathering is independently performed, the pipeline's opportunity to manipulate transportation access and prices *through the mechanism of controlling the price of gathering* does not exist. The orders under review here address that specific problem.

The power we recognize here granted by §§ 4 and 5 does not extend to the physical gathering process, including such matters as "physical activities, facilities, and properties used in the [production and] gathering of natural gas."[96] Those activities are within the purview of the states; the exercise of Federal power would be an unnecessary interference in the affairs of states and localities.[97] This case, however, involves interstate rates for which no local interest attaches and to which the states could not

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[94] 15 U.S.C. § 3301(21).

[95] 15 U.S.C. § 3320.

[96] *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 678, 74 S. Ct. 794, 797, 98 L.Ed.2d 1035, 1046 (1954); *see also Panhandle Eastern Pipe Line Corp. v. Public Serv. Comm'n*, 332 U.S. 507, 68 S. Ct. 190, 92 L.Ed. 128 (1947).

[97] *Interstate Natural Gas*, 331 U.S. 682, 690, 67 S. Ct. 1482, 1486-87, 91 L.Ed. 1742, 1748 (1947).

constitutionally or practicably exercise regulatory power.[98] Therefore no conflict with local authority exists.

The Commission's orders forestall an obvious opportunity for jurisdictional interstate pipelines to discriminate and create undue preferences in favor of their own gas in both jurisdictional interstate transportation and sales at the expense of the procompetitive purposes of the NGA, the NGPA and the Commission's Order No. 436, to the ultimate disadvantage of the ultimate consumers of gas, and in violation of the explicit provisions of § 4 of the NGA.

We therefore hold the Commission's orders are valid.

AFFIRMED.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

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[98] *Id.* at 690-91, 67 S. Ct. at 1486-87, 91 L.Ed. at 1748.

Northern Natural Gas Company

Docket No. RP85-206-000

Order Approving Contested Offer of Settlement as Modified

(Issued December 22, 1986)

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon, Charles A. Trabandt and C. M. Naeve.

I. Introduction

Before us for review is a contested offer of settlement (Settlement) filed by Northern Natural Gas Company (Northern). The Settlement is intended to resolve all issues in the instant general rate proceeding and to implement the rates, terms, and conditions under which Northern will implement open access transportation service under Order No. 436.[1] The Settlement is supported in its entirety by the great majority of the parties. On the other hand, several parties have opposed parts of the Settlement on grounds which we shall address below. We shall approve the Settlement subject to several modifications.

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[1] Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, *FERC Statutes and Regulations, Regulations Preambles 1982-85* ¶ 30,665 (1985) (Order No. 436), *modified, FERC Statutes and Regulations, Regulations Preambles 1982-85* ¶ 30,675 (1985) (Order No. 436-A), *pet. for review filed sub nom., Associated Gas Distributors v. F.E.R.C.*, No. 85-1811 (D.C. Cir., filed Dec. 12, 1985).

II. Procedural Background

On September 26, 1985, Northern filed revised tariff sheets proposing decreased rates and a number of other changes in its FERC Gas Tariff, Third Revised Volume No. 1 and Original Volume No. 2. The proposed rates would decrease annual revenues by $20.6 million. By order issued October 25, 1985,[2] in the instant docket, the Commission accepted the tariff sheets for filing effective October 27, 1985, subject to refund and established hearing procedures. On April 11, 1986, Northern filed its Offer of Settlement and Stipulation and Agreement (Settlement) in this proceeding. On April 15, 1986, Northern also filed its Offer of Settlement and Stipulation and Agreement for Interim Rates (Interim Stipulation).[3]

On July 17, 1986, the presiding administrative law judge (ALJ) certified Northern's contested Settlement and the Interim Stipulation to the Commission.[4]

The proposed Settlement does two things: (1) it resolves Northern's September 26, 1985 filing under section 4(e) of the Natural Gas Act (NGA)[5] in this docket, and (2) it provides for an open-access transportation proposal under Commission Order No. 436. Except as otherwise provided, the Settlement is to become effective as of October 27, 1985, and is to terminate on the earlier of the date of effect of Northern's next subsequent section 4 rate increase filing or on the date of effect of rates resulting from a proceeding instituted by the Commission.

* * *

[2] 33 FERC ¶ 61,067 (1985).

[3] The purpose of the Interim Stipulation was to implement the settlement rates proposed in the Settlement for the time period between May 27, 1986, through the earlier of August 26, 1986, or the date of a final order approving the Settlement. This particular portion of Northern's filing is now moot.

[4] 36 FERC ¶ 63,024 (1986).

[5] 15 U.S.C. § 717c(e) (1982).

A. Rates

1. Gathering Rates

Both staff and the Indicated Shippers point out that Northern failed to include in its Settlement, a separately stated rate for gathering service in conjunction with its open access transportation services even though "a gathering rate was negotiated and developed together with all other rates proposed in the [Settlement]."[21] In its reply comments, at 48-51, Northern states that it proposes to separately charge gathering rates for these services on the theory that its gathering services are non-jurisdictional under the NGA. Both Staff and Indicated Shippers disagree that they are non-jurisdictional, and urge that we direct Northern to set out in its proposed tariff sheets the rates it proposes to charge for gathering. Order No. 436 specifically requires the separate identification of gathering costs.[22] Moreover, there is no record to determine whether the subject services are gathering. However, without rendering an opinion on the question of jurisdiction at this time, we believe it is consistent with Order No. 436 to modify the Settlement to provide that Northern shall reflect its gathering rates in its tariff sheets. In this way, potential shippers will be apprised of the full cost of the services they intend to purchase. Further, because the gathering rates are a part of the total settlement package, and are unopposed, we will accept the Settlement, as conditioned above.

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[21] *See* Staff Initial Comments at 19.

[22] 18 C.F.R. § 284.7(d) (1986).

Northern Natural Gas Company, Division of Enron Corporation

Docket Nos. RP85-206-011, RP85-206-012, RP85-206-013, RP85-206-014, RP85-206-015, RP85-206-016, RP85-206-017, RP85-206-018, RP85-206-019, RP85-206-020, RP85-206-021, RP85-206-022, RP85-206-023, RP85-206-024, RP85-206-025, RP85-206-026, and RP85-206-027

Order Granting in Part and Denying in Part Rehearing and Granting Clarification

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(Issued November 9, 1987)

Before the Commissioners: Martha O. Hesse, Chairman: Anthony G. Sousa, Charles G. Stalon and C. M. Naeve.

I. Introduction

On December 22, 1986, the Commission issued an order approving a contested offer of settlement as modified in this proceeding.[1] In that order, we approved, subject to certain conditions, a settlement that established the rates, terms and conditions under which Northern Natural Gas Company (Northern) will perform open access transportation under Part 284 of the Commission's regulations

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[1] 37 FERC ¶ 61,272 (1986).

(Settlement).[2] Numerous parties have applied for rehearing of our December 22, 1986 order. For the reasons set forth below, the Commission grants rehearing in part, denies rehearing in part, and clarifies that order. In addition, we shall sever for further consideration the issues of title and capacity brokering.[3]

* * *

H. Gathering Rates

The Indicated Shippers and Northern take issue with the Commission's treatment of gathering rates. The Indicated Shippers argue that the Commission erred in approving Northern's gathering charges without substantial evidence to support the derivation of such rates. On the other hand, Northern argues that since gathering rates are not subject to the Commission's jurisdiction, it is unlawful for the Com-

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[2] Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 436, *FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,665, *modified*, Order No. 436-A, *FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,675 (1985), *modified further*, Order No. 436-B, *FERC Statutes and Regulations* ¶ 30,688, *reh'g denied*, Order No. 436-C, 34 FERC ¶ 61,404, *reh'g denied*, Order No. 436-D, 34 FERC 61,405, *reconsideration denied*, Order No. 436-E, 34 FERC ¶ 61,403 (1986), *vacated and remanded, sub nom. Associated Gas Distributors v. FERC*, No. 85-1811 (D.C. Cir. June 23, 1987) (generally upholding the substance of Order No. 436 and the procedures employed in adopting it, but finding problems with certain issues and vacating and remanding the matter for further proceedings). On August 7, 1987, the Commission issued Order No. 500, which promulgated interim regulations in response to the court's remand. *See* Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, *FERC Statutes and Regulations* ¶ 30,761 (1987) (Interim Rule and Statement of Policy, Docket No. RM87-34-000). These interim regulations became effective on September 15, 1987.

[3] The severance of these issues for further consideration does not affect our requirement that Northern refile its tariff sheets within 30 days from the date of issuance of this order. *See* Ordering Paragraph (C), *infra*.

mission to require that Northern separately identify its gathering costs.

Northern did not include in the Settlement a separately stated rate for gathering service in conjunction with its open-access transportation program, although a gathering rate was negotiated among the parties. Northern stated that it intended to separately charge gathering rates because gathering services are not subject to the Commission's jurisdiction under the NGA. There is no record to determine whether the services at issue here are gathering or production area transmission subject to the Commission's jurisdiction. However, section 284.7(d)(1)[24] of the Commission's regulations provides that rates for open-access transportation separately identify costs attributable to transportation, storage, and gathering. Since Northern failed to state a rate for gathering service the December 22, 1986 order required it to do so. The Commission indicated that it was consistent with Order No. 436 to have Northern file and state its gathering rate in its tariff so that shippers can be apprised of the total cost of services they plan to purchase.[25]

Notwithstanding the Indicated Shippers' contention to the contrary, the Commission did not approve Northern's gathering rates because they have not yet been filed. It was Northern's failure to file gathering rates that prompted the staff and Indicated Shippers to request that the Commission require it to do so. The Commission indicated that because the gathering rates were considered an element of the total settlement package and were unopposed, it would accept the Settlement on the condition that Northern state its gathering rates in its tariff.[26] The Commission, however, is unable to determine the lawfulness of Northern's gathering rates until it files revised tariff sheets in compliance with this order.

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[24] 18 C.F.R. § 284.7(d)(1) (1987).

[25] 37 FERC at pp. 61,812-61,813.

[26] *Id.*

FEDERAL ENERGY REGULATORY COMMISSION

WASHINGTON, D. C. 20426

Letter Order Pursuant to §375.307(b)(2)
OPPR - Allocation and Rate Design Branch
Northern Natural Gas Company,
Division of Enron Corporation
Docket No. RP85-206-030

JAN 28 1988

Northern Natural Gas Company
2223 Dodge Street
Omaha, Nebraska 58102

Attention: William R. Cordes, Vice President

Reference: Tariff Sheets Listed on Appendix A

Ladies and Gentlemen:

On November 27, 1987, Northern Natural Gas Company, Division of Enron Corporation, proffered the referenced tariff sheets to implement the terms of settlement of Docket No. RP85-206-000, as modified and approved by the Commission's orders of December 22, 1986 and November 11, 1987 in that proceeding. The filing fails to reflect compliance with the approved terms of settlement in several significant respects.

In particular, Northern has not complied with the approved settlement in the following regards:

* * *

(4) Northern's gathering rates have not been derived from the costs allocated to or the representative volumes associated with gathering service in RP85-206. Accordingly, Northern's rate derivation must be revised. Further, Northern's gathering rate sheet contains a clause declaring that the stated rates do not reflect the price Northern

may charge for gathering. This provision is in direct contravention of the Commission's requirement that rates charged under the open-access transportation program be stated rates and should be removed from the tariff.

Additionally, we note the following concerns raised by your filing which require further revision:

* * *

Because the filing does not reflect compliance with all directives set forth in the Commission's orders of December 22, 1986 and November 11, 1987 in the subject proceeding, the referenced tariff sheets are hereby rejected. This rejection is without prejudice to Northern refiling revised tariff sheets in full compliance with the terms of the settlement as approved and modified by the Commission in Docket No. RP85-206.

Sincerely,

/s/ Raymond A. Beirne for

Richard P. O'Neill, Director
Office of Pipeline and Producer Regulation

cc: All Parties

Northern Natural Gas Company, Division of Enron Corporation

Docket No. RP85-206-035

Letter Order

(Issued April 14, 1988)

By Direction of the Commission: Lois D. Cashell, Acting Secretary.

On February 26, 1988, Northern Natural Gas Company, Division of Enron Corporation, proffered the referenced tariff sheets to implement the terms of settlement of Docket No. RP85-206-000, as modified and approved by the Commission's orders of December 22, 1986 and November 9, 1987 [41 FERC ¶ 61,158], in these proceedings. This is to advise you that the tendered tariff sheets have been found to be in compliance with the approved settlement and are thus accepted for filing to be effective on the dates designated thereon.

On March 11, 1988, Indicated Shippers filed a protest to the instant compliance filing alleging Northern's failure to demonstrate that its proposed gathering rate is derived properly. Based on review of the workpapers filed in this docket and the revisions made by Northern in accordance with the Director of the Office of Pipeline and Producer Regulation's January 28, 1988 letter order, we find the gathering rate to be developed based on the costs allocated to gathering and the representative volumes projected for gathering services in the settlement. Therefore, the gath-

ering rate and corresponding tariff sheet are in compliance with our orders in this proceeding. In view of this, Indicated Shippers' protest is dismissed.

This acceptance for filing shall not be construed as a waiver of the requirements of Section 7 of the Natural Gas Act, as amended; nor shall it be construed as constituting approval of the referenced filing or of any rate, charge, classification, or any rule, regulation or practice affecting such rate or service contained in your tariff; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such acceptance is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against your company.

* * *

Northern Natural Gas Company Division of Enron Corp.

Docket Nos. RP85-206-036 and RP85-206-039

Order Denying Appeal of Staff Action and Denying Rehearing

(Issued June 15, 1988)

Before Commissioners: Martha O. Hesse, Chairman; Anthony G. Sousa, Charles G. Stalon and Charles A. Trabandt.

On February 26, 1988, Northern Natural Gas Company, a division of Enron Corporation (Northern), filed an appeal from staff action in the instant docket. Northern alleges that the January 28, 1988 letter order of the Director of the Office of Pipeline and Producer Regulation improperly rejected a tariff sheet filed to comply with a Commission order that it separately state its rates for gathering. The letter order rejected the tariff sheet because it contained a proviso stating that the gathering rates were stated for informational purposes only and that the Commission has no jurisdiction over the gathering activities in question.

Background

This proceeding began in September of 1985 when Northern filed revised tariff sheets setting forth rates and conditions of service subject to Commission jurisdiction. The tariff sheets were accepted for filing subject to refund. In April of 1986, Northern filed an offer of settlement for approval. The proposed settlement included a provision for open-access transportation under Part 284 of the regulations. However, in its settlement proposal, Northern failed

to separately state the rates for its gathering services as required by section 284.7(d)(1).[1] Northern stated that it intended to charge its customers separate rates for these services but was not compelled to state its rates to the Commission because the Commission lacked jurisdiction over gathering under section 1(b) of the Natural Gas Act.[2]

In its order approving Northern's open-access proposal, the Commission, without determining the question of jurisdiction, ordered Northern to separately state its gathering rates.[3] The Commission reasoned that requiring Northern to separately state its rates for gathering was necessary to insure that Northern's customers would be fully apprised of the full cost of the services they intended to purchase.[4] On rehearing, the Commission upheld its earlier decision and ordered Northern to file revised tariff sheets stating its gathering rates.[5] The Commission's orders are presently pending on appeal in the U.S. Court of Appeals for the Eighth Circuit.[6]

In tariff sheets filed on November 27, 1987, to comply with the above orders, Northern set forth its maximum and minimum gathering rates with a footnote which stated that the rates were provided for informational purposes only and did not imply Commission jurisdiction. The Director's letter order rejected the filing, holding, *inter alia*, that the footnote violated the requirement of a separate statement of gathering rates by declaring that the stated rates do not reflect the price Northern may charge for gathering.

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[1] 18 C.F.R. § 284.7(d)(1) (1987).

[2] Natural Gas Act, 15 U.S.C. § 717(b).

[3] *Northern Natural Gas Company*, 37 FERC ¶ 61,272, at pp. 61,812-13 (1986).

[4] *Northern, Id.* at p. 61,813.

[5] 41 FERC ¶ 61,158 (1987).

[6] *Northern Natural Gas Co. v. Federal Energy Regulatory Commission*, No. 88-1042 (8th Cir., pet. for review filed January 7, 1988).

Northern appealed from the Director's order, again relying on NGA section 1(b) to argue that the Commission lacks jurisdiction to require it to file its gathering rates as part of its tariff or to determine the lawfulness of the rates.[7] Therefore, it argues, the Commission should accept the tariff sheets stating the rates for informational purposes only.

Discussion

The Commission continues to believe it unnecessary to reach the issue whether Northern's service here at issue is gathering, as that term is used in NGA section 1(b). Even assuming that Northern's service is gathering, the Commission has jurisdiction to determine the justness and reasonableness of the rates, terms, and conditions under which the gathering service is performed. At most, the section 1(b) gathering exemption would exempt Northern's gathering service and facilities from NGA section 7 certificate jurisdiction.

Under section 4(a) of the NGA, 15 U.S.C. § 717c (emphasis added):

> All rates and charges made, demanded, or received by any natural-gas company for *or in connection with* the transportation or sale of natural gas subject to the jurisdiction of the Commission and all rules and regulations *affecting or pertaining to* such rates or charges, shall be just and reasonable.

[7] On February 26, 1988, Northern resubmitted its November 27, 1987 compliance filing with the revisions required by the Director's order. The filing included Original Sheet No. 4g.3 which stated the minimum and maximum rates for gathering but did not include the controversial language regarding jurisdiction. On April 14, 1988, the Commission by letter order, accepted for filing the tariff sheets including Original Sheet No. 4g.3. Northern subsequently requested rehearing of the April 14, 1988 order (Docket No. RP85-206-039) [43 FERC ¶ 61,158] in order to preserve its position on appeal in Docket No. RP85-206-036. This order resolves that rehearing request as well.

Section 5 of the NGA provides that when the Commission finds that any rate charged by a natural gas company "in connection with" any jurisdictional transportation or sale of natural gas, or that any rule, regulation, or practice affecting such rate is unjust, unreasonable, or unduly discriminatory, the Commission must determine the just and reasonable rate, rule, or regulation to be thereafter observed.[8]

These sections require the Commission to determine the rates, rules and regulations not only for the actual transportation or sales subject to the Commission's jurisdiction, but also for other services performed in connection with or ancillary to such transportation and sales. If the phrase "in connection with the transportation or sale of natural gas", as used in sections 4 and 5, were construed to mean simply "for transportation or sale of natural gas", the words "or in connection with" in section 4(a) would become meaningless surplusage, contrary to the rule that every phrase of a statute must be given effect.[9]

This interpretation of sections 4 and 5 of the Act comports with the intent of Congress in enacting the NGA. Congress enacted the NGA to fill the gaps in the regulation of natural gas created when the Supreme Court ruled that "the regulation of wholesale rates of gas and electrical energy moving in interstate commerce is beyond the constitutional powers of the States".[10] Congress desired to protect consumers of natural gas from exploitation at the hands of natural gas companies, and particularly interstate pipeline companies which controlled the move-

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[8] 15 U.S.C. § 717 d.

[9] *See, New York v. Shore Realty Corp.*, 759 F.2d 1032 (2nd Cir. 1985), and *Natural Insulation Transp. Committee v. I.C.C.*, 683 F.2d 533 (D.C. Cir. 1982).

[10] *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682, 689 (1947), *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 609-610 (1944), *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 683 (1954).

ment of gas from the producing fields to the distribution markets by their monopolistic grip on the nation's pipeline system.[11] As stated by the Supreme Court, "[t]he point is . . . that Congress did not desire an 'attractive gap' in its regulatory scheme; rather, Congress intended to impose a comprehensive regulatory system on the transportation, production, and sale of this valuable resource."[12] Accordingly, "in a borderline case where congressional authority is not explicit we must ask whether state authority can practically regulate a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs."[13]

Congress' grant to the Commission of jurisdiction over the rates, terms and conditions for services ancillary to the transportation and sale of natural gas in interstate commerce includes the authority to determine the justness and reasonableness of the rates, terms and conditions of Northern's gathering services here at issue, even assuming that the service is "gathering" within the meaning of section 1(b).[14] Otherwise, there would be a gap in the regulation of gas in interstate commerce, contrary to Congress's intent. The gathering here at issue is provided in connec-

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[11] The interstate pipeline system was controlled by integrated holding companies. *See e.g., Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954) and *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). *See also*, Hearings on H.R. 11662, Subcommittee of House Committee on Interstate and Foreign Commerce, 74th Cong., 2d Sess., pp. 11-12 and S. Doc. 92, Pt 84-A, Final Report, Federal Trade Commission to the Senate pursuant to S. Res. No. 83, 70th Cong., 1st Sess., p. 73. The latter report referred to the "[u]nregulated control of pipeline transmission and of wholesale distribution as a 'positive evil'."

[12] *FPC v. Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 28 (1961).

[13] *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972).

[14] If the service is transportation, the Commission has jurisdiction under NGA section 7 as well as jurisdiction to regulate the rates, terms and conditions under sections 4 and 5.

tion with Northern's open-access transportation under Part 284. The Commission adopted Part 284 in order to provide interstate consumers access to the wellhead market, which Congress found in the NGPA to be competitive. Before adoption of Part 284, pipelines generally refused to transport gas that would compete with their own sales. This denied interstate consumers access to gas at the lowest reasonable rates. Denial of access to such gathering would defeat Part 284's goal of providing interstate consumers access to the wellhead market. Furthermore, excessive rates for gathering services provided in connection with open-access transportation could be used as a barrier to open-access transportation and would also defeat the goal of lower prices to consumers.

Accordingly, regulation of the rates, terms, and conditions for gathering service, provided in conjunction with Part 284, is predominantly a matter of national, rather than local, concern and must be regulated on the federal level rather than by the state in which the gathering takes place.[15] State regulation would conflict with the goal of a uniform national transportation scheme envisioned by Congress and implemented by the Commission in Part 284. In any event, there is no reason to believe that the state

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[15] *Interstate*, 331 U.S. at 692. The issue of the Commission's authority to regulate the rates, terms, and conditions of gathering performed by pipelines on behalf of others has not previously arisen, because until recently pipelines generally did not perform such service. Before adoption of Part 284, pipelines generally sold gas to their customers rather than simply transporting it, and the cost of gathering was collected through their sales rates regulated by the Commission. There was therefore no need to give special scrutiny to gathering rates or services apart from regulation of the sales rates. By contrast, transportation on behalf of others is now a major part of most pipelines' business, and open-access transportation is a key element in the Commission's current regulation of pipelines. Thus, the Commission must now separately scrutinize both the rates charged for gathering and the terms and conditions of that service performed in connection with transportation.

in which the gathering takes place would regulate that service since the gas is destined for consumption in the interstate market. Thus, even if the states could regulate the gathering service, such regulation is not practicable. The Supreme Court's statement in *Interstate*, 331 U.S. at 693, is equally applicable here:

> Unreasonable charges exacted at this stage of the interstate movement become perpetuated in large part in fixed items of costs which must be covered by rates charged subsequent purchasers of the gas, including the ultimate consumer. It was to avoid such situations that the Natural Gas Act was passed.

Section 1(b) does not prevent the Commission from asserting jurisdiction under sections 4 and 5 over the rates, terms and conditions of Northern's gathering service. The Supreme Court has held that the gathering exception is to be "strictly construed"[16] or "narrowly confined"[17] so as not to limit the NGA's "primary grant of jurisdiction."[18] Thus, the Supreme Court has construed the gathering exemption to apply to non-price matters such as the "physical activities, facilities, and properties used in the . . . gathering of natural gas"[19] that are within the authority of the states to regulate under the Supreme Court's pre-Natural Gas Act Commerce Clause cases. *Interstate*, 331 U.S. at 690. Thus, if Northern's service is gathering, section 1(b) may exempt Northern's gathering service and facilities from the Commission's section 7 certificate jurisdiction. However, it does not exempt the gathering service from sections 4 and 5 jurisdiction because of the need to protect the ultimate interstate consumers from excessive rates or unduly discriminatory practices that impede

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[16] *Interstate*, 331 U.S. at 691; *Phillips*, 347 U.S. at 679.

[17] *Northern Natural Gas Co. v. Kansas*, 372 U.S. 84, 90 (1962).

[18] *Supra*, n. 16.

[19] *Phillips*, 347 U.S. at 678.

access to the wellhead market. In this order, we assert only sections 4 and 5 jurisdiction, not section 7 jurisdiction.[20]

Thus, consistent with Congress' intent to close all gaps in the regulation of the movement and sale of natural gas, Congress gave the Commission the authority to determine the justness and reasonableness of the rates, terms, and conditions of Northern's gathering, performed in connection with its open-access transportation. This authority includes the authority to require Northern to separately state its gathering rate so that shippers can determine the actual costs of the services being offered and plan their purchasing strategies accordingly. Therefore, the Commission denies the appeal of the Director's January 1988 order requiring Northern to refile its gathering rates without the qualifying language and denies rehearing of the Commission's April 1988 letter order accepting Northern's compliance filing without that language.

The Commission orders:

(A) The appeal of the Director's January 28, 1988 order is denied.

(B) The request for rehearing of the Commission's April 14, 1988 letter order is denied.

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[20] Under the NGA the Commission's rate and certificate jurisdiction are separate, and a finding of rate jurisdiction does not necessarily lead to a finding of certificate jurisdiction. *See Mid-America Pipeline Co. v. FPC*, 330 F.2d 226, 228-229 (D.C. Cir. 1964).

Northern Natural Gas Company, Division of Enron Corp.

Docket No. RP85-206-040

Order Denying Rehearing

(Issued September 22, 1988)

Before Commissioners: Martha O. Hesse, Chairman; Charles G. Stalon and Charles A. Trabandt.

On July 15, 1988, Northern Natural Gas Company, Division of Enron Corp. (Northern), filed a request for rehearing of the Commission's "Order Denying Appeal of Staff Action and Denying Rehearing" issued in the above-captioned docket on June 15, 1988.[1] That order upheld a January 28, 1988 letter order issued by the Director of the Office of Pipeline and Producer Regulation which rejected a tariff sheet filed by Northern because it contained a proviso stating that its gathering rates were stated for informational purposes only. The June 15, 1988 order also denied rehearing of the Commission's April 14, 1988 letter order [43 FERC ¶ 61,158] which approved tariff sheets filed in compliance with the January 28, 1988 order.[2]

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[1] 43 FERC ¶ 61,473 (1988).

[2] On February 26, 1988, Northern resubmitted its November 27, 1987 compliance filing with the revisions required by the Director's order. The filing was accepted by Commission letter order on April 14, 1988. Northern subsequently requested rehearing of the April 14, 1988 decision in order to preserve its position on appeal from the January 28 Director's order in Docket No. RP85-206-036.

Background

This proceeding began on September 26, 1985 when Northern filed revised tariff sheets setting forth rates and conditions of service subject to Commission jurisdiction. The tariff sheets were accepted for filing subject to refund. In April of 1986, Northern filed an offer of settlement for approval. The proposed settlement included a provision for open-access transportation under Part 284 of the regulations. However, in its settlement proposal, Northern failed to separately state the rates for its gathering services as required by section 284.7(d)(1).[3] Northern stated that it intended to charge its customers separate rates for these services but was not compelled to state its rates because the Commission lacked jurisdiction over gathering under section 1(b) of the Natural Gas Act (NGA).[4]

In its order approving Northern's open-access proposal, the Commission, without determining the question of jurisdiction, ordered Northern to separately state its gathering rates.[5] The Commission reasoned that requiring Northern to separately state its rates for gathering was necessary to insure that Northern's customers would be fully apprised of the full cost of the services they intended to purchase. On rehearing, the Commission upheld its earlier decision and ordered Northern to file revised tariff sheets stating its gathering rates.[6] The Commission's orders issued December 22, 1986 and November 9, 1987, are

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[3] 18 C.F.R. § 284.7(d)(1) (1988).

[4] Section 1(b) of the Natural Gas Act states that the "Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale . . . but shall not apply to . . . the production or gathering of natural gas." Natural Gas Act, 15 U.S.C. § 717(b).

[5] 37 FERC ¶ 61,272 (1986).

[6] 41 FERC ¶ 61,158 (1987).

presently pending on appeal in the U.S. Court of Appeals for the Eighth Circuit.[7]

In tariff sheets filed on November 27, 1987, to comply with the above orders, Northern set forth its maximum and minimum gathering rates with a footnote which stated that the rates were provided for informational purposes only and did not imply Commission jurisdiction. The Director's January 28, 1988 letter order rejected the compliance filing, holding that the footnote violated the requirement of a separate statement of gathering rates by declaring that the stated rates do not reflect the price Northern may charge for gathering.

Northern appealed the Director's order, again relying on section 1(b) of the NGA to argue that the Commission lacks jurisdiction to require Northern to file gathering rates as part of its tariff or to determine the lawfulness of the rates.

In the June 15, 1988 order the Commission affirmed its previous orders in this docket, stating that the Commission has authority under sections 4 and 5 of the NGA to determine the justness and reasonableness of the rates, terms and conditions of Northern's gathering service performed in connection with its open-access transportation.

Northern's Request for Rehearing

In its petition requesting rehearing, Northern asserts that the Commission has no authority under section 1(b) of the Natural Gas Act to exercise jurisdiction over the rates Northern charges for its gathering service. Northern states that the Commission's interpretation of sections 4 and 5 of the NGA is contrary to the express language of the NGA, the legislative history supporting its enactment and Supreme Court interpretations of the NGA. Specifi-

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[7] *Northern Natural Gas Co. v. Federal Energy Regulatory Commission*, No. 88-1042 (8th Cir., pet. for review filed January 7, 1988).

cally, Northern contends that the Commission's reliance on sections 4 and 5 is inconsistent with Supreme Court opinions that hold that sections 4, 5, and 7 do not concern the producing and gathering of natural gas but apply only to the interstate sale and transportation of gas.[8] In addition, Northern argues that even if the phrase "in connection with" contained in sections 4 and 5 of the Act granted the Commission rate jurisdiction over nonjurisdictional services, the Commission's determination that gathering is one of such services is inconsistent with the express language of section 1(b).

Northern next argues that the Commission's order is inconsistent with the legislative history of the Natural Gas Act and that the Commission's reliance on the attractive gap theory is misplaced. Northern states that it is only in borderline situations where Congressional authority is not explicit that the Commission must determine whether state authority can practically regulate a given area. Northern contends that the Commission ignores the threshold requirement that there be a situation where Congressional authority is not explicit before the Commission can assert jurisdiction. Northern states that Congressional authority is explicit in this instance because section 1(b) expressly states that Commission jurisdiction shall not apply to gathering.

Northern also states that the Commission has never previously found that it possessed the authority to determine the lawfulness of gathering rates. Until now, Northern states, the Commission has applied various tests (*see, e.g., Farmland Industries Inc.*, 23 FERC ¶ 61,063 (1983)) to determine whether the facilities in question were transportation facilities subject to Commission jurisdiction or if they were gathering facilities and thus outside the scope of Commission jurisdiction.

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[8] *Citing FPC v. Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 508 (1949); *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581 (1945).

Northern also claims that the Commission has selectively asserted jurisdiction over gathering provided by interstate pipelines, but not over producers that are also considered "natural-gas companies" within the meaning of the NGA. Northern states that such disparate treatment is made without any explanation from the Commission.

Finally, Northern argues that the requirement that Northern state its gathering rate in its tariff is contrary to Commission regulations which require tariffs to show "all rates and charges for any transportation or sale of natural gas subject to the jurisdiction of the Commission . . . "[9] because gathering is not subject to Commission jurisdiction under section 1(b) of the NGA. Northern contends that the Commission's order is unlawful and *ultra vires* because there is no statutory authority or authority in the regulations under Order No. 436 [*FERC Statutes and Regulations, Regulations Preambles 1982-1985* ¶ 30,665] to justify the Commission's attempt to regulate gathering rates.

Discussion

In the June 15 order the Commission stated that sections 4 and 5 of the NGA require the Commission to determine the lawfulness of rates, rules and regulations for gathering services performed in connection with or ancillary to the transportation and sale of natural gas subject to Commission jurisdiction. In reaching its conclusion the Commission emphasized that its interpretation of sections 4 and 5 was consistent with the intent of Congress in enacting the NGA and Supreme Court interpretations of section 1(b) of the NGA.

Under section 4(a) of the NGA, 15 U.S.C. § 717c (emphasis added):

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[9] 18 C.F.R. § 154.1 (1988).

> All rates and charges made, demanded, or received by any natural-gas company for *or in connection with* the transportation or sale of natural gas subject to the jurisdiction of the Commission and all rules and regulations *affecting or pertaining to* such rates or charges, shall be just and reasonable.

Section 5 of the NGA provides that when the Commission finds that any rate charged by a natural gas company "in connection with" any jurisdictional transportation or sale of natural gas, or that any rule, regulation, or practice affecting such rate is unjust, unreasonable, or unduly discriminatory, the Commission must determine the just and reasonable rate, rule, or regulation to be thereafter observed.[10]

Northern argues that the Commission's interpretation of sections 4 and 5 is inconsistent with Supreme Court opinions that have held that sections 4 and 5 do not concern the producing and gathering of gas but apply only to the interstate transportation and sale of natural gas. Northern also argues that the Commission's interpretation is inconsistent with the language of section 1(b) which exempts gathering from Commission jurisdiction.

In the June 15 order, the Commission made it clear that section 1(b) does not prevent the Commission from asserting jurisdiction over Northern's gathering service under sections 4 and 5. The Commission pointed out that the Supreme Court has construed the gathering exemption of section 1(b) to apply to non-price matters such as the "physical activities, facilities, and properties used in the . . . gathering of natural gas."[11] Therefore, the Commission reasoned that regardless of whether Northern's service here at issue is gathering within the meaning of section 1(b), the Commission still has the authority to determine

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[10] 15 U.S.C. § 717d.

[11] *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 678 (1954).

the reasonableness of the rates, terms, and conditions under which the gathering service is performed. The Commission emphasized that "[a]t most, the section 1(b) gathering exemption would exempt Northern's gathering service and facilities from NGA Section 7 certificate jurisdiction."[12] Accordingly, Northern's arguments with regard to section 1(b) are without merit.

The Commission's interpretation of sections 4 and 5 of the Act is consistent with the intent of Congress to close all gaps in the regulation of the transportation and sale of natural gas. These gaps were created when the Supreme Court held that "the regulation of wholesale rates of gas . . . moving in interstate commerce is beyond the constitutional powers of the states."[13] Congress recognized the potential for consumer exploitation at the hands of natural gas companies that monopolized the movement of gas from the producing fields to the distribution markets. In order to prevent such exploitation, Congress imposed a comprehensive regulatory system on the production, transportation and sale of natural gas which granted the Commission extensive regulatory authority while simultaneously retaining state jurisdiction over the activities of production and gathering.

However, within this regulatory scheme, occasions arise when the dividing line between state and federal regulatory authority becomes muted. In such borderline situations "we must ask whether state authority can practically regulate in a given area and, if we find that it cannot, then we are impelled to decide that federal authority governs."[14] In this instance the Commission found that state regulation would not be practicable because states in which

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[12] 43 FERC at p. 62,160.

[13] *Interstate Natural Gas Co. v. FPC*, 331 U.S. 682, 689 (1947), *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 609-610 (1944).

[14] *FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 631 (1972).

gathering is conducted lack the incentive to regulate that service "since the gas is destined for consumption in the interstate market."[15] Northern argues that Congressional authority is explicit in this instance because of the section 1(b) gathering exclusion. However, Northern's argument ignores the distinction drawn between state jurisdiction over the physical activity of gathering and federal jurisdiction over the rates charged for gathering provided in connection with jurisdictional sales and transportation.

In addition, the Commission recognized that regulation of gathering "provided in conjunction with Part 284 is predominantly a matter of national, rather than local, concern and must be regulated on the Federal level . . . ".[16] Therefore, the Commission found that it must regulate the rates and conditions of gathering conducted in connection with Part 284 transportation in order to prevent a gap in the regulation of gas in interstate commerce. Such regulation is essential to insure that the policies underlying Order No. 436, *et seq.* are attained.

Northern also states that the Commission has never previously exercised jurisdiction over gathering rates. In making this statement, Northern fails to recognize that prior to adoption of Order No. 436, pipelines served primarily as merchants of natural gas; purchasing gas from producers and then transporting and selling the gas to end-users. The cost of gathering was rolled into the interstate pipelines' sales for resale rates so that there was no need to give special scrutiny to gathering rates or service apart from regulation of the sales rates. Now, however, with the advent of Order No. 436, the transportation of gas on behalf of others has become a major part of most pipelines' business and open access to that service is a key element in the Commission's current regulation of pipelines. Accordingly, the Commission must now

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[15] 43 FERC at p. 62,161.

[16] *Id.*

separately scrutinize the rates charged for gathering performed in connection with transportation in order to insure that the Commission's policies underlying open-access transportation remain intact. The Commission's June 15 order does nothing to impede upon a state's right to regulate matters other than the rates, terms and conditions of a jurisdictional pipeline's gathering activities.

Northern also alleges that the Commission has selectively exercised jurisdiction over gathering provided by interstate pipelines, but not over producers performing gathering that are considered "natural gas companies" within the meaning of the NGA. Because the Commission was not presented with the issue of whether a producer performing gathering services falls within the Commission's jurisdiction under sections 4 and 5 of the NGA, the Commission's June 15 order is limited to interstate pipelines performing gathering services in connection with jurisdictional transportation and sales for resale. In any event, the Commission's NGA sections 4 and 5 rate jurisdiction does not apply to a producer or anyone else performing gathering that is a "natural gas company" that is making a first sale of gas as defined in NGPA section 2(21). In that case, the gathering rate would be determined under the Commission's regulations adopted pursuant to section 110 of the NGPA, concerning production-related costs.

The authority of the Commission to determine the justness and reasonableness of the rates, terms, and conditions of Northern's gathering performed in connection with its open-access transportation is consistent with the intent of Congress in enacting the NGA and the express terms of the Act. This authority includes the authority to require Northern to separately state its rate for gathering. Accordingly, the Commission denies the request for rehearing of the Commission's June 15, 1988 order.

The Commission orders:

The request for rehearing of the Commission's June 15, 1988 order is denied.

NORTHERN NATURAL GAS COMPANY
Division of Enron Corp.
F.E.R.C. Gas Tariff
Third Revised Volume No. 1 Original Sheet No. 4g.3

CURRENTLY EFFECTIVE RATES

	Charge Per MMBtu Per Gathering System	
	Minimum	Maximum
Field Gathering[1]	$ .0150	$ .2202

[1] Reflects Northern's gathering cost of service. Provided for informational purposes only and not as a limitation of prices which may be charged or to imply recognition of or assent to Commission jurisdiction over such activities.

Issued by: William R. Cordes
Vice President
Regulatory Affairs
Issued on: November 27, 1987

Effective: December 1, 1987

NORTHERN NATURAL GAS COMPANY
Division of Enron Corp.
F.E.R.C. Gas Tariff
Third Revised Volume No. 1 Original Sheet No. 4g.3

CURRENTLY EFFECTIVE RATES

	Charge Per MMBtu Per Gathering System	
	Minimum	Maximum
Field Gathering	$ .0100	$ .1471

Issued by: William R. Cordes
Vice President
Regulatory Affairs
Issued on: February 26, 1988

Effective: December 1, 1987

EXHIBIT "A"
TO
GAS GATHERING AGREEMENT
DATED
January 14, 1987
BETWEEN
Northern Natural Gas Company
Division of Enron Corp.
AND
Delhi Gas Pipeline Corporation

Delivery Point/ Facility Number/Psia	Well Name/Receipt Point/Facility Number	Rate ¢ Per MMBtu
Beaver County #1, S2, T5N, R28E, Beaver County, OK Fac. #D.P. 6 Psia—13.3	Downs #1—TXC—S2, T27N, R23W, Harper County, OK Fac. #R.P. 3400	16.58
Beaver County #13, S24, T3N, R24E, Beaver County, OK Fac. #D.P. 17 Pisa—13.4	Miller Raynor #1-CNG S32, T3, R24, Beaver County, OK Fac. #R.P. 421	16.58
Perryton—Gathering S929, Blk 43, H&TC Survey, Ochiltree County, TX Fac. #D.P. 2509 Pisa—13.2	Marjor #1—Delhi, S27, T1N, R22E, Beaver County, OK Fac. #R.P. 2036	16.58
	Darrell A#1 S27, T1N, R22E, Beaver County, OK Fac.# R.P. 3502	16.58

CDK205

NGA Section 1(b)
15 U.S.C. § 717(b)

§ 717. Necessity for regulation of natural gas companies

* * *

(b) The provisions of this chapter shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

* * *

June 21, 1938, c. 556, § 1, 52 Stat. 821; Mar. 27, 1954, c. 115, 68 Stat. 36.

NGA Sections 2(1) and 2(6)
15 U.S.C. §§ 717a(1) and a(6)

§ 717a. Definitions

When used in this chapter, unless the context otherwise requires—

(1) "Person" includes an individual or a corporation.

* * *

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.

* * *

June 21, 1938, c. 556, § 2, 52 Stat. 821.

NGA Sections 4(a)-4(e)
15 U.S.C. §§ 717c(a)-(e)

§ 717c. Rates and charges; schedules; suspension of new rates

(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from June 21, 1938) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulation, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such

notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, State commission or gas distributing company, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by

the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

June 21, 1938, c. 556, § 4, 52 Stat. 822; May 21, 1962, Pub.L. 87-454, 76 Stat. 72.

NGA Sections 5(a)-(b)
15 U.S.C. §§ 717d(a)-(b)

§ 717d. Fixing rates and charges; determination of cost of production or transportation

(a) Whenever the Commission, after hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however*, That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

(b) The Commission upon its own motion, or upon the request of any State commission, whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transportation of natural gas by a natural-gas company in cases where the Commission has no authority to establish a rate governing the transportation or sale of such natural gas.

NGA Sections 7(a)-(h)
15 U.S.C. §§ 717f(a)-(h)

§ 717f. Construction, extension, or abandonment of facilities

(a) Extension or improvement of facilities on order of court; notice and hearing

Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) Abandonment of facilities or services; approval of Commission

No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) Certificate of public convenience and necessity

(1)(A) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on February 7, 1942, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after February 7, 1942. Pending the determination of any such application, the continuance of such operation shall be lawful.

(B) In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however*, That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements

of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(2) The Commission may issue a certificate of public convenience and necessity to a natural-gas company for the transportation in interstate commerce of natural gas used by any person for one or more high-priority uses, as defined, by rule, by the Commission, in the case of—

(A) natural gas sold by the producer to such person; and

(B) natural gas produced by such person.

(d) Application for certificate of public convenience and necessity

Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Granting of certificate of public convenience and necessity

Except in the cases governed by the provisos contained in subsection (c)(1) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission

shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

(f) Determination of service area; jurisdiction of transportation to ultimate consumer

(1) The Commission, after a hearing had upon its own motion or upon application, may determine the service area to which each authorization under this section is to be limited. Within such service area as determined by the Commission a natural-gas company may enlarge or extend its facilities for the purpose of supplying increased market demands in such service area without further authorization; and

(2) If the Commission has determined a service area pursuant to this subsection, transportation to ultimate consumers in such service area by the holder of such service area determination, even if across State lines, shall be subject to the exclusive jurisdiction of the State commission in the State in which the gas is consumed. This section shall not apply to the transportation of natural gas to another natural gas company.

(g) Certificate of public convenience and necessity for service of area already being served

Nothing contained in this section shall be construed as a limitation upon the power of the Commission to grant certificates of public convenience and necessity for service of an area already being served by another natural-gas company.

(h) Right of eminent domain for construction of pipelines, etc.

When any holder of a certificate of public convenience and necessity cannot acquire by contract, or is unable to agree with the owner of property to the compensation to

be paid for, the necessary right-of-way to construct, operate, and maintain a pipe line or pipe lines for the transportation of natural gas, and the necessary land or other property, in addition to right-of-way, for the location of compressor stations, pressure apparatus, or other stations or equipment necessary to the proper operation of such pipe line or pipe lines, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such property may be located, or in the State courts. The practice and procedure in any action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided*, That the United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000.

June 21, 1938, c. 556, § 7, 52 Stat. 824; Feb. 7, 1942, c. 49, 56 Stat. 83; July 25, 1947, c. 333, 61 Stat. 459; as amended Nov. 9, 1978, Pub.L. 95-617, Title VI, § 608, 92 Stat. 3173; Oct. 6, 1988, Pub.L. 100-474, § 2, 102 Stat. 2302.

NGPA Section 110(a)
15 U.S.C. § 3320(a)

§ 3320. Treatment of State severance taxes and certain production-related costs

(a) Allowance for State severance taxes and certain production-related costs.—Except as provided in subsection (b) of this section, a price for the first sale of natural gas shall not be considered to exceed the maximum lawful price applicable to the first sale of such natural gas under this part if such first sale price exceeds the maximum lawful price to the extent necessary to recover.—

(1) State severance taxes attributable to the production of such natural gas and borne by the seller, but only to the extent the amount of such taxes does not exceed the limitation of subsection (b) of this section; and

(2) any costs of compressing, gathering, processing, treating, liquefying, or transporting such natural gas, or other similar costs, borne by the seller and allowed for, by rule or order, by the Commission.

* * *

NGPA Sections 601(a)(1)(A)-(D)
15 U.S.C. §§ 3431(a)(1)(A)-(D)

§ 3431. Coordination with Natural Gas Act

(a) Jurisdiction of Commission under Natural Gas Act.—

(1) Sales.—

(A) Natural gas not committed or dedicated.—For purposes of section 1(b) of the Natural Gas Act, effective on the first day of the first month beginning after November 9, 1978, the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply to natural gas which was not committed or dedicated to interstate commerce as of November 8, 1978, solely by reason of any first sale of such natural gas.

(B) Committed or dedicated natural gas.—Effective beginning on the first day of the first month beginning after November 9, 1978, for purposes of section 1(b) of the Natural Gas Act, the provisions of such Act and the jurisdiction of the Commission under such Act shall not apply solely by reason of any first sale of natural gas which is committed or dedicated to interstate commerce as of November 8, 1978, and which is—

(i) high-cost natural gas (as defined in section 3317(c)(1), (2), (3), or (4) of this title);

(ii) new natural gas (as defined in section 3312(c) of this title); or

(iii) natural gas produced from any new, onshore production well (as defined in section 3313(c) of this title).

(C) Authorized sales or assignments.—For purposes of section 1(b) of the Natural Gas Act,

the provisions of the Natural Gas Act and the jurisdiction of the Commission under such Act shall not apply by reason of any sale of natural gas—

(i) authorized under section 3362(a) or 3371(b) of this title; or

(ii) pursuant to any assignment authorized under section 3372(a) of this title.

(D) Natural-gas company.—For purposes of the Natural Gas Act, the term "natural-gas company" (as defined in section 2(6) of such Act) shall not include any person by reason of, or with respect to, any sale of natural gas if the provisions of the Natural Gas Act and the jurisdiction of the Commission do not apply to such sale solely by reason of subparagraph (A), (B), or (C) of this paragraph.

* * *

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No. 91-14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NORTHERN NATURAL GAS COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF RESPONDENT INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

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BRIEF OF RESPONDENT INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

The Interstate Natural Gas Association of America ("INGAA") respectfully submits its Brief in support of Petitioner in this case. INGAA was a party in the court proceeding below.

STATEMENT OF INTEREST

INGAA is a non-profit national trade association representing virtually all of the major interstate natural gas transmission companies operating in the United States. The companies account for over 90 percent of all natural gas transported and sold for resale in interstate commerce. INGAA's members also include major Canadian interprovincial pipelines subject to regulation by the National Energy Board of Canada. INGAA's U.S. members are regulated by the Federal Energy Regulatory Commission ("Commission") under the Natural Gas Act ("NGA"), 15 U.S.C. §§ 717-717w, and to a lesser extent, under the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3301-3432.[1]

SUMMARY OF ARGUMENT

This case involves orders of the Commission which, for the first time since the Natural Gas Act was enacted in 1938, assert jurisdiction over the gathering

[1] INGAA adopts Petitioner's Statement of the Case and supports the arguments in support thereof.

activities of interstate pipelines notwithstanding the specific exclusion of gathering from the provisions of the NGA and in complete disregard of the numerous decisions of this Court that gathering is beyond the Commission's statutory reach. In upholding the Commission's orders, the court below disregarded the express terms of the NGA, the legislative history of the NGA, the decisions of this Court and a recent decision of the Court of Appeals for the Tenth Circuit. Section 1(b) of the NGA plainly states that its provisions shall not apply to "the production or gathering of natural gas." Instead,Congress left such regulation to the individual states, as this Court has often recognized. The decision of the court below is not supported by law and contradicts the intent of Congress to place gathering rates and facilities beyond the Commission's authority.

As a matter of fundamental agency jurisdiction, this case is of major importance to the natural gas industry and the millions of consumers it serves. Billions of dollars have been invested in gathering facilities in accordance with the long-standing belief that such facilities were excluded from federal regulation. If left standing, the decision below would severely impact on the ability of interstate pipelines to compete on equal terms with others who perform the same function but are deemed to be excluded from federal regulation. This negation of the plain meaning of Section 1(b) is completely unprecedented, contrary to Congressional intent, and an encroachment on the power of Congress to determine the scope of federal regulation of natural-gas companies. The issue raised by the court below has not previously been before the Supreme Court and a decision by this Court is

imperative to resolve this important question of statutory interpretation and public policy.

REASONS FOR GRANTING THE WRIT

ARGUMENT

I. THE OPINION BELOW CONTRADICTS CLEAR CONGRESSIONAL INTENT, AS EXPRESSED IN THE EXPLICIT LANGUAGE AND LEGISLATIVE HISTORY OF THE STATUTE, AND FIFTY YEARS OF PRECEDENT.

This case brings to the Supreme Court, a question of interpretation of the scope of the Federal Energy Regulatory Commission's powers under Section 1(b) of the NGA, 15 U.S.C. § 717(b). Section 1(b) is no stranger to this Court. In a long line of cases from *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), to *Northwest Central Pipeline Corp. v. State Corp. Comm'n*, 489 U.S. 493 (1989), this Court has been called upon to interpret the meaning and scope of Section 1(b).

The court below, however, does not rely on the explicit language of Section 1(b) ("the Natural Gas Act's basic grant of jurisdiction"[2]) and the legislative history of the NGA. Instead, it relies on other provisions of the NGA, *viz.* Sections 4 and 5, 15 U.S.C. §§ 717c and 717d, as negating the gathering exclusion of Section 1(b) and creating for the Commission the authority to assert jurisdiction over the gathering rates of interstate pipelines. Such action is directly

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[2] *American Gas Ass'n v. Federal Energy Regulatory Comm'n*, 912 F.2d 1496, 1506 (D.C. Cir. 1990), *cert. denied sub nom. City of Willcox v. Federal Energy Regulatory Comm'n*, 111 S. Ct. 957 (1991).

contrary to the statute itself and the decisions of this Court, and is unsupportable under any reasoned interpretation of the powers given the Commission by Congress.

Congressional intent to grant the Commission jurisdiction over specific aspects of the natural gas industry is explicitly stated:

> The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale. . . .

NGA Section 1(b), 15 U.S.C. § 717(b). Similarly explicit is Congress' intent to withhold jurisdiction from certain other aspects of the natural gas industry, such as gathering:

> The provisions of this Act . . . shall not apply . . . to the production or gathering of natural gas.

Id. Thus, as this Court has explained, Section 1(b):

> determines the Act's coverage and does so in light of the situation existing at the time. Three things and three only Congress drew within its own regulatory power, delegated by the Act to its agent, the Federal Power Commission. These were: (1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale;

> and (3) natural gas companies engaged in such transportation or sale.

Panhandle Eastern Pipe Line Co. v. Public Service Comm'n, 332 U.S. 507, 516 (1947).

Since 1938, when the NGA was enacted, the explicit language of Section 1(b) has excluded gathering activities from the Commission's jurisdiction. In case after case involving the extent of Commission jurisdiction, this Court has considered the explicit language of Section 1(b) in the context of the legislative history as to Congress' intent. For example, in *Federal Power Comm'n v. Panhandle Eastern Pipeline Co.*, 337 U.S. 498, 502-16 (1949), this Court explored at great length the legislative history of the NGA, and concluded that the transfer of gas leases was outside the scope of the Commission's jurisdiction because of Section 1(b)'s exclusion of "the production or gathering of natural gas."

Without reciting again each facet of the legislative history that applies, it is important to emphasize that the intended scope of Section 1(b) on the specific point at issue here was addressed in the testimony of Dozier A. DeVane, the Solicitor of the Federal Power Commission, who was requested by the House Committee on Interstate and Foreign Commerce to "explain the provisions of the bill:"

> The bill makes no attempt to regulate the production or gathering facilities of a natural gas company, this function being purely local in character, nor is any attempt made to exercise control over distribution facilities.

Hearing Before a Subcommittee of the Committee on Interstate and Foreign Commerce on H.R. 11662 to

Regulate the Transportation and Sale of Natural Gas in Interstate Commerce and for Other Purposes, 74th Cong., 2d Sess. 17 (1936) (Statement of Dozier A. DeVane, Solicitor, Federal Power Commission). In an exchange with the ranking minority member of the House Commerce Committee, Mr. DeVane stated:

> MR. DeVANE: Now, section 1(b) also provides that the Commission shall have no jurisdiction over the gathering or gathering rates for natural gas.
>
> MR. COOPER: What do you mean by gathering rates?
>
> MR. DeVANE: The rates that are paid in the gathering field, Mr. Cooper.
>
> MR. COOPER: All right.

Id. at 28.

The bill that was discussed in the above statement and exchange was not reported out of Committee, but another bill which contained the "production or gathering" exemption was subsequently approved. In the report accompanying that bill, the Committee stated that production, gathering, and local distribution:

> could not be said fairly to be covered by the language affirmatively stating the jurisdiction of the Commission, but similar language was in previous bills, and, rather than invite the contention, however unfounded, that the elimination of the negative language would broaden the scope of the act, the committee has included it in this bill.

H.R. Rep. No. 709, 77th Cong., 1st Sess. 3 (April 28, 1937). H.R. 6586, the bill which is addressed in the above statement, passed without amendment in the House, where its floor manager flatly stated, "The bill does not apply to the production and gathering of gas." 81 Cong. Rec. H6721 (daily ed. July 1, 1937) (statement of Rep. Lea). The same bill was eventually passed by both the House and the Senate, with amendments not pertinent here, and without Senate Committee or floor debates on the matters of gathering and gathering rates.[3]

This Court has consistently recognized that the legislative history of the NGA demonstrates an intent on the part of Congress to complement, not supplant, the authority of the states over production and gathering (in the state of production) and over local distribution (in the state of consumption). As this Court has explained:

> the Natural Gas Act did not envisage federal regulation of the entire natural-gas field to the limit of constitutional power. Rather it contemplated the exercise of federal power as specified in the Act, particularly in that interstate segment which the states were powerless to regulate because of the Commerce Clause of the Federal Constitution. The jurisdiction of the Federal Power Commission was to complement that of the state regulatory bodies.

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[3] *See* S. Rep. No. 1162, 75th Cong., 1st Sess. (Aug. 11, 1937); 81 Cong. Rec. S9312 (daily ed. Aug. 19, 1937); 83 Cong. Rec. S8347, S9130, S9146, H9502-03, 75th Cong., 1st Sess. (June 1937).

Panhandle Eastern, supra, 337 U.S. at 502-03 (footnotes omitted). *See also Federal Power Comm'n v. Southern California Edison Co.*, 376 U.S. 205, 211-14 (1964); *Public Utilities Comm'n v. United Fuel Gas Co.*, 317 U.S. 456, 467 (1943) (summarizing the legislative history of the split between federal and state jurisdiction under the NGA and the Federal Power Act).

The explicit language of Section 1(b), when considered together with the legislative history of the NGA, leaves no room for doubt in this case. *See Northwest Central, supra*, 489 U.S. at 510-11; *Federal Energy Regulatory Comm'n v. Martin Exploration Management Co.*, 486 U.S. 204, 209 (1988) (quoting *Bethesda Hospital Ass'n. v. Bowen*, 485 U.S. 399, 403 (1988) ("The plain meaning of the statute decides the issue presented.")).

Moreover, prior to this time, the Commission has consistently ruled in other proceedings that gas gathering activities are not within its power to control and, indeed, in several recent proceedings has rejected on jurisdictional grounds tariff filings of gathering companies and producers covering gathering rates. *See, e.g., Farmland Industries, Inc.*, 23 F.E.R.C. ¶ 61,063 (1983); *Locust Ridge Gas Co.*, 37 F.E.R.C. ¶ 61,295 (1986); *Shell Gas Pipe Line Co.*, 41 F.E.R.C. ¶ 61,032 (1987). While not controlling, it is nevertheless significant that after fifty years of administration of the NGA, the Commission now seeks to control an area that heretofore it considered beyond its reach. In *Panhandle Eastern, supra*, this Court noted the significance of such a failure to act after ten years of Commission administration of the NGA:

> Thus for over ten years the Commission has never claimed the right to regulate dealings in gas acreage. Failure to use such power for so long a time indicates to us that the Commission did not believe the power existed.

337 U.S. at 513 (footnote omitted).

II. THE "THEORY" UNDERLYING THE DECISION OF THE COURT BELOW HAS NO LEGAL FOUNDATION.

The "theory" of the court below is that the Commission, irrespective of Section 1(b), may regulate rates charged by pipelines for gathering services since such services are ostensibly performed "*in connection with* jurisdictional interstate transportation." (App. 3a) (emphasis in original). Key to the court's rationale are the phrases "for or in connection with" in Section 4(a), 15 U.S.C. 717c(a), and "in connection with" in Section 5(a), 15 U.S.C. 717d(a).[4] The court relied on these phrases as giving the Commission "explicit" authority to regulate interstate pipeline gathering rates. (App. 21a). This reliance is misplaced and its premise is flawed.

To start with, as noted previously, Section 1(b) states plainly that "[t]he provisions of this Act . . . shall not apply to . . . gathering of natural gas." 15 U.S.C. § 717(b). Such exclusion plainly applies to *all* provisions of the NGA, including Sections 4 and 5. Second, the phrase "in connection with" cannot be taken out of context. The court below failed to give effect to the phrase of which the words "in connection with" are a part. Each time Congress used that

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[4] The provisions of Sections 4 and 5 are set forth in full in App. 62a-64a, and 65a, respectively.

phrase in Sections 4 and 5 of the NGA, it explicitly confined the Commission's authority to activities of natural-gas companies which are "subject to the jurisdiction of the Commission." Therefore, the phrase "in connection with" is limited solely to the activities to which it relates, *viz.* "transportation or sale of natural gas *subject to the jurisdiction of the Commission.*" 15 U.S.C. §§ 717c(a), 717d(a) (emphasis added). The full meaning of Sections 4 and 5 thus reinforces and is in complete agreement with Section 1(b). Gathering is neither a "sale" of natural gas "subject to the jurisdiction of the Commission" nor "transportation" in interstate commerce "subject to the jurisdiction of the Commission." Gathering is an activity which Congress specifically elected to exclude from the jurisdictional confines of the NGA.

The lack of a legal foundation for the Sections 4 and 5 "theory" is also evident in the lower court's claim that Commission jurisdiction extends over gathering "rates," but not gathering "facilities." (App. 22a). Such selective extension of jurisdiction is contrary to Section 4(b), which draws no distinction between jurisdiction over "rates" as opposed to "facilities." In Section 4(b), both "rates" and "facilities" are treated consistently, *i.e.*, "with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission," natural gas companies are prohibited from maintaining "any unreasonable difference in *rates*, charges, service, *facilities*, or in any other respect, either as between localities or as between classes of service." 15 U.S.C. § 717c(b) (emphasis added). Gathering, which is not "transportation or sale of natural gas subject to the jurisdiction

of the Commission," is not subject to Section 4(b) with respect to either rates or facilities.[5]

Judicial precedent also treats rates and facilities consistently for jurisdictional purposes. This Court has found "no conflict in the directives of the two sections [Section 4 and Section 7][6]. Indeed, they supplement one another and thereby work together in efficient conjunction to carry out the purposes of the Act." *Federal Power Comm'n v. Hunt*, 376 U.S. 515, 523 (1964). *See also Tennessee Gas Pipeline Co. v. Federal Energy Regulatory Comm'n*, 905 F.2d 446, 449 (D.C. Cir. 1988). Similarly, the lack of a distinction between rates and facilities was implicit in the question presented in *Northwest Pipeline Corp. v. Federal Energy Regulatory Comm'n*, 905 F.2d 1403 (10th Cir. 1990). In the orders under review in that case, the "threshold issue [was] whether the Commission has jurisdiction over Northwest's *facilities* and has the authority to determine the level of the *rates* charged by Northwest." *Northwest Pipeline Corp.*, 38 F.E.R.C. ¶ 61,302, at 61,981 (1987). (emphasis added). *See infra*, Part III.

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[5] While the court below states that jurisdiction over gathering rates is "necessary to preserve the Commission's §§ 4 and 5 responsibility to prevent discrimination against shippers who must depend on monopolistic pipelines for transportation" (App. 25a), the provision of the NGA which prohibits certain types of discrimination (*i.e.*, Section 4(b)) expressly limits such prohibition to "any transportation or sale of natural gas subject to the jurisdiction of the Commission," and omits the "in connection with" language so crucial to the opinion below. *See infra*, Part IV.

[6] Section 7 (15 U.S.C. § 717f) confers authority to certificate facilities for jurisdictional activities.

This Court has stated, "Sections 4, 5 and 7 do not concern the producing or gathering of natural gas; rather they have reference to the interstate sale and transportation of gas and are so limited by their express terms." *Panhandle Eastern, supra*, 337 U.S. at 508. This Court has thus recognized that the Commission lacks jurisdiction over gathering "rates" pursuant to Sections 4 and 5, as well as over gathering "facilities" pursuant to Section 7. *See* Pet. at 7-9.

The court below asserts that the "in connection with" language indicates that Congress "foresaw the Commission's need for the ability to regulate other aspects of the natural gas industry" besides interstate transportation and sales for resale. (App. 26a, 27a). Such Congressional foresight is not evident in the explicit language of Sections 1(b), 4, and 5. Furthermore, the court below made such assertion without any reference to the legislative history of the NGA, although this Court has frequently referred to the legislative history in construing the NGA.

To INGAA's knowledge, the legislative history contains no statement reflecting a Congressional intent that the words "in connection with" are to be construed so as to negate the exclusion of gathering in Section 1(b). To the contrary, Congress clearly intended that the affirmative grants of jurisdiction over interstate transportation and sales would not confer any jurisdiction over gathering. *See supra*, testimony of FPC Solicitor DeVane; *Panhandle Eastern, supra*, 337 U.S. at 504-505; *Colorado Interstate Co. v. Federal Power Comm'n*, 324 U.S. 581, 602-03 (1945).

The court below itself recognizes its negation of Section 1(b) in the way it frames the question presented to it:

> May the Commission, under the NGA's §§4 and 5, regulate rates charged for gathering on the pipeline's own gathering facilities in connection with jurisdictional transportation, *notwithstanding* the explicit §1(b) exclusion of gathering from the act?

(App. 17a) (emphasis added). By answering this question in the affirmative, the court below subsumes gathering within jurisdictional transportation. This is evident from its assertion that any difference between gathering charges and transportation rates "doesn't matter" for purposes of determining the Commission's rate-regulatory jurisdiction under the NGA. (App. 26a). This Court, however, has always distinguished between gathering and jurisdictional activities, and has never construed any part of the NGA (including the "in connection with" language of Sections 4 and 5) to negate the explicit exclusion contained in Section 1(b). *See Hope Natural Gas, supra*, 320 U.S. 591; *Interstate Natural Gas Co. v. Federal Power Comm'n*, 331 U.S. 682 (1947); *Colorado Interstate Gas, supra*, 324 U.S. 581.

The court below relies heavily on *Colorado Interstate*, as did the Commission. Their reliance on *Colorado Interstate* is misplaced, and it misconstrues the holding in that case. The lower court claims that this Court in *Colorado Interstate* affirmed an extension of Commission jurisdiction that includes "regulation of *rates* for gathering performed in connection with interstate sales. . . ." (App. 18a) (emphasis added). This Court did no such thing. *See* Pet. at 14-18. In *Colorado Interstate*, this Court held that the Commission may, consistently with Section 1(b), ascertain gathering expenses included in the sale for resale rate:

"We only decide that [Section 1(b)] does not preclude the Commission from reflecting the production and gathering facilities of a natural-gas company in the rate base and determining the expenses incident thereto for the purposes of determining the reasonableness of rates subject to its jurisdiction." *Id.* at 603. In so holding, this Court affirmed the Commission's power to consider the costs of gathering facilities and operations that are included in the jurisdictional sales rate that is subject to its rate-regulatory authority. This ruling, however, did not extend the Commission's jurisdiction. This Court carefully recognized the distinction created by Congress between gathering and jurisdictional sales. It did not hold, as the court below contends, that the Commission has the authority to exercise "control of rates for gathering." (App. 18a) (emphasis added).

In his concurring opinion in *Colorado Interstate*, Mr. Justice Jackson clearly and succinctly described the scope of this Court's 5-4 ruling, stating:

> It is true that the Act excludes "production or gathering of natural gas" from jurisdiction of the Commission. If the Commission had imposed any direct regulation upon that activity, I would join in holding it to have exceeded its jurisdiction. But the orders in question have no immediate "impact" upon production or gathering of gas.
>
> The statute commands the Commission to regulate the price of natural gas transported and sold at wholesale in interstate commerce for resale. The Commission has investigated the fiscal aspects of production and gathering

> because of their bearing on the reasonableness of interstate rates. I suppose a commission is free to take evidence as to conditions and events quite *beyond its regulatory jurisdiction* where they are thought to affect the cost of that whose price it is directed to determine. This, as I see it, is all that has been done here.

Id. at 609 (emphasis added).

As recognized by Justice Jackson, this Court held that the Commission can consider conditions and events beyond its regulatory jurisdiction in computing a pipeline's jurisdictional rates. This Court did not hold that the Commission has jurisdiction over nonjurisdictional activities which impact on jurisdictional matters. Thus, as a consequence of *Colorado Interstate*, the Commission was empowered to collect evidence regarding gathering costs included in jurisdictional sales rates. This has been the practice of the Commission for the last forty-six years. At no time, until now, has the Commission sought to regulate gathering rates. In contrast, the opinion below would empower the Commission to require interstate pipelines to file a rate for gathering service, so that a "just and reasonable" rate could be determined for such nonjurisdictional service.

The court below claims that its holding is consistent with *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954), in which this Court held that "sales in interstate commerce for resale by producers to interstate pipeline companies do not come within the 'production or gathering' exemption." *Phillips*, 347 U.S. at 680-81 (citing *Interstate, supra*).

According to the court below, in both *Phillips* and *Interstate*, "the granted power was held not to be subordinate to the exclusion." (App. 24a). However, the court below claims that the rate-regulatory authority over gathering which it discovers in Sections 4 and 5 is a "granted power" which can be construed independently of, and contrary to, the exclusion of gathering in Section 1(b). Nothing in *Phillips* supports such a claim. The "granted power" in *Phillips* was "the affirmative grant of jurisdiction over . . . sales in the first clause of §1(b)." *Phillips*, 347 U.S. at 677.

In *Phillips*, this Court required that the Commission exercise its rate-regulatory authority under Sections 4 and 5 within the boundaries defined by one of the affirmative grants of jurisdiction in Section 1(b). In contrast, the decision by the court below sanctions an exercise of regulatory power that is completely unmoored from the jurisdictional provisions of Section 1(b). As noted by the court below, this Court has stated that " '[e]xceptions to the primary grant of jurisdiction in the section [1(b)] are to be strictly construed' so that the broad purposes of the Act will not be compromised." (App. 17a) (footnote omitted). The opinion of the court below, however, cannot be understood as a strict construction of the gathering exclusion enacted by Congress. Rather, it constitutes an expansion of jurisdiction into a new area, gathering, in direct conflict with the explicit exclusion of that area from Commission jurisdiction by Section 1(b). In effect, the court below has attempted to redraw the boundaries which only Congress may draw.

III. THE DECISION OF THE EIGHTH CIRCUIT IS IN CONFLICT WITH A DECISION OF THE TENTH CIRCUIT.

In *Northwest Pipeline Co. v. Federal Energy Regulatory Comm'n*, 905 F.2d 1403, 1411 (1990), the United States Court of Appeals for the Tenth Circuit held that the Commission "failed to provide a reasoned explanation for classifying [Northwest Pipeline Company's gathering] lines as jurisdictional" and thus subject to the Commission's ratemaking authority. It reversed the Commission and remanded the case for a determination as to whether the facilities at issue are gathering facilities and therefore exempted from the Commission's jurisdiction under Section 1(b). *Id.* at 1412-1413. In so doing, the court held that "the facilities [at issue] are either gathering and exempt from jurisdiction or transportation and subject to jurisdiction." *Id.* at 1412.

The Eighth Circuit's assertion to the contrary notwithstanding, the "theory of [its] decision" is in direct conflict with that of the Tenth Circuit. (App. 26a).

In *Northwest*, the Commission, as here, attempted to assert jurisdiction over the gathering service of an interstate pipeline in a rate proceeding involving the pipeline's rates for transportation and sales in interstate commerce. As here, the Commission in the Tenth Circuit asserted that its action is "an essential facet to the expanded regulatory role Congress intended in the agency's oversight of national energy production," citing Order 436,[7] which imposes open access trans-

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[7] Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 436, 50 Fed. Reg. 42,408 (Oct. 18, 1985), F.E.R.C. Stats. & Regs., Regulations Preambles, 1982-1985,

portation conditions on pipelines and establishes a policy of fostering competitive market forces. *Northwest* at 1406. The Tenth Circuit rejected this contention, while the court below accepted essentially the same argument *in toto*.

The Eighth Circuit fully embraced the Commission's contention that its new open access statement of policy in Order 436 and the changes it had made to "facilitate competition in the market for natural gas" (App. 5a) had "given rise to questions regarding the distinction between gathering and interstate transportation and the regulation thereof under the provisions of the NGA." (App. 6a). The court below framed the question before it in this manner:

> The question is whether the Federal Energy Regulatory Commission (FERC) may, in implementing its Open Access Order No. 436, regulate the rates that natural gas pipeline companies charge third-party interstate transportation shippers for moving natural gas on gathering facilities owned by the pipeline.

(App. 2a-3a) (footnotes omitted). The court answered in the affirmative, concluding that to do otherwise would defeat "the Commission's purpose in promulgating Order No. 436, and is contrary to the purposes and explicit provisions of the NGA and the pro-competitive goals of the NGPA." (App. 20a, 29a).

The Tenth Circuit took the opposite view, citing this Court's opinion in *Colorado Interstate* for the

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¶ 30,665 (1985) (codified as amended in scattered sections of 18 C.F.R. Parts 2, 157, 284, 375, and 381). *See* App. 2a n.1.

proposition that " 'under section 1(b) the Commission does not have express or implied rate-regulatory jurisdiction of the production and gathering of gas.' " *Id.* at 1406. Its decision proceeds on the basis that Congress meant what it said and, consequently, if a particular facility performs gathering, it is exempt from Commission jurisdiction and only Congress can decree otherwise. Unlike the case below, the Commission in *Northwest* initially embarked on an analysis using its so-called "primary function" test to determine whether Northwest's lines were gathering and thus exempt from federal regulation or transportation subject to the Commission's jurisdiction. While the Commission found it unnecessary to make a determination with respect to Northern's lines (App. 53a-55a), the paths taken by the Commission in the two cases are parallel. The "test" it applied in *Northwest* did not adhere to the traditional criteria as set forth in its landmark opinion in *Farmland Industries, Inc.*, 23 F.E.R.C. ¶ 61,295 (1985). Instead, the Commission asserted that despite any possible showing under *Farmland* that the facilities might perform gathering, the Commission nonetheless would deem them jurisdictional because of the alleged primary transportation function, *i.e.*, ultimately the facilities are owned by and eventually connected to a company which has as its primary function the interstate transportation of gas. *Northwest* at 1410. In short, even if performing traditional gathering functions, Northwest's gathering lines would be deemed to be jurisdictional. *Id.* at 1408.

The Tenth Circuit concluded that the Commission "improperly applied its own test" to Northwest's gathering facilities and, by taking Northwest's status

as an interstate pipeline subject to its jurisdiction as one factor in its analysis, it "in fact subsumed the primary function analysis within that factor." *Id.* at 1410. The court noted further that the Commission had based its position on the policies adopted in Order No. 436, and that the "questions in this case are submerged in the broad policy discussions about the need for national supervision of energy policy." *Id.* at 1407, n.11, 1411.[8]

The *Northwest* court rejected all of these arguments. Citing Section 1(b)'s clear distinction between transportation in interstate commerce and gathering activities, the court concluded that "the movement of gas alone from the wellhead cannot transform the services into interstate transportation," and that the Commission "failed to provide a reasoned explanation for classifying these lines as jurisdictional." *Id.* at 1411. The Tenth Circuit held that "[t]he gathering exemption was not meant to attach only to certain owners/operators but to facilities." *Id.* "[T]he result [of its test] must still be based on the calculation of these [primary function] factors in this adjudication, not the Commission's perception of national regulatory policy. Indeed, although FERC may construct sound policy in this case, we do not believe it satisfies its own precedent or the intent of Congress." *Id.*

In sharp contrast, the Eighth Circuit swept aside the statutory limitations of Section 1(b) and relied on

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[8] The court quoted the Commission's Brief which stated that " '[w]hat is at stake in this proceeding is the Commission's ability to carryout (sic) its statutory mandate by fostering wellhead competition in a national commodity market through an open, unified natural gas transportation network.' " *Id.* at 1411, n. 21 (parenthetical in original).

the Commission's statement of policy as set forth in Order No. 436. Under the Eighth Circuit's analysis, gathering is subject to Commission jurisdiction because it is conducted by an interstate pipeline. The Tenth Circuit, as noted above, took a directly opposite position. With regard to Order No. 436, the *Northwest* court clearly held that Section 1(b) is the controlling consideration, "not the Commission's perception of national regulatory policy." *Id.* As stated by the Tenth Circuit:

> Thus, although FERC's power to regulate may extend to the limits of its statutory jurisdiction, the "express jurisdictional limitation on FERC's powers contained in § 1(b) of the NGA," *Northwest Central Pipeline*, 109 S. Ct at 1274, cannot be recast or obscured in the agency's attempt to formulate policy to protect the public interest and burner-tip consumer. Unless Congress removes existing limitations on FERC's jurisdiction, the Agency's perception of national policy cannot establish or alter that jurisdiction which Congress has expressly granted. *See FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 636, 92 S.Ct. 1827, 1836, 32 L.Ed.2d 369 (1972).

Id. at 1407 (footnote omitted).

The Eighth Circuit contended there was no conflict between the Tenth Circuit's opinion and "the theory of our decision" (App. 26a), because the *Northwest* court simply reversed and remanded as a result of the Commission's failure to apply its own "primary function test," and so declined to address the Com-

mission's Sections 4 and 5 argument, which of course, the Eighth Circuit embraced as its own. (App. 26a).

The Eighth Circuit reads too much into the Tenth Circuit's decision not to consider the Commission's "alternate" Sections 4 and 5 argument. What is plain from the Tenth Circuit's decision is that it did not just "simply" reverse and remand, it thoroughly explored and decided the primary issue of the statutory limitations on the Commission's powers under Section 1(b). It required the Commission to adhere to the statutory mandate of Section 1(b) that gathering is exempt from Commission jurisdiction. It did not accept the Commission's contention, made also to the Eighth Circuit, that the overriding consideration was not the function of the nature of the line but whether it was a facility owned and operated by an interstate pipeline. It further rejected the position of the Commission that gathering by an interstate pipeline is governed, not by the proscriptions of Section 1(b), but by the consideration of the broad open access policy promulgated in Order No. 436. The whole thrust of the Tenth Circuit's decision, therefore, is directly at odds with the "theory" of the Eighth Circuit's decision, which was guided by the Commission's asserted need to regulate pipeline gathering rates to foster the policy goals of Order No. 436. The fact that the Tenth Circuit decided not to address the Sections 4 and 5 argument is incidental to and does not in any way change the central legal premise of that court's opinion.

There is a basic conflict between the Circuits which this Court should review.

IV. THE OPINION BELOW ENCROACHES ON THE POWER OF CONGRESS TO DETERMINE THE SCOPE OF FEDERAL AUTHORITY OVER NATURAL-GAS COMPANIES.

According to the court below, jurisdictional rates for transportation in interstate commerce can be "manipulate[d]" by interstate pipelines, unless the Commission is allowed to regulate the gathering rates charged by such pipelines. The court below claims that unregulated "manipulation" of gathering rates would be contrary to the intent of Congress to protect third-party shippers, and by extension, "[t]he public, the ultimate consumer." (App. 19a-20a).

The court below errs in two respects. First, the comprehensive, public-interest scheme of consumer protection which was enacted by Congress consists of both state and federal regulation, "and the critical inquiry is whether Congress intended state or federal authority to govern." *Federal Power Comm'n v. Transcontinental Gas Corp.*, 365 U.S. 1, 27 (1961). The intent of Congress with respect to gathering is clear: "effective public control" over gathering and production is entrusted to the states, and not to the federal government. *Interstate, supra*, 331 U.S. at 690.[9]

Second, the court below errs in suggesting that gathering is somehow tantamount to jurisdictional

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[9] *See also* H.R. Rep. No. 709, 75th Cong., 1st Sess. 2 (the NGA "takes no authority from State commissions. . . ."). In Order No. 436, the Commission noted that recent state legislation had offered purchasers of natural gas "increased flexibility and a real ability to purchase competitive gas supplies where interstate transportation is available." Order No. 436, *supra*, F.E.R.C. Stats. & Regs., Regulations Preambles, 1982-1985, at 31,487.

transportation when the interstate pipeline is the owner/operator of the gathering facilities:

> Permitting a pipeline to manipulate the otherwise unregulated charges for gathering services performed over its own facilities in connection with jurisdictional interstate transportation, would, in effect, permit the *pipeline* to establish rates for the interstate transportation.

(App. 19a) (emphasis in original). Section 1(b) creates no distinction among natural-gas companies which perform gathering services. It explicitly excludes gathering from Commission control, regardless of whether the owner/operator is an interstate pipeline or some other entity, such as a producer. The analysis of the court below ignores this clear line drawn by Congress. It would expand the meaning of "transportation in interstate commerce" beyond what Congress intended, thereby eliminating the explicit exclusion for gathering.

Moreover, the assertion of regulatory necessity is unsupported as a factual matter. The court below claims that:

> the Commission has by its orders and regulations demonstrated that 'in connection with' interstate transportation, regulation of the charges made by the pipeline for gathering over its own facilities is essential to prevent discrimination against third-party gas in interstate transportation and sales.

(App. 25a). While the court below does not cite any orders or regulations in the above passage, it apparently is claiming that a necessity for Commission ju-

risdiction over gathering was "demonstrated" in Order No. 436 and in the "open-access" regulations promulgated therein. If so, the court below is in error. In Order No. 436, the Commission emphasized that it "has no choice in the matter; we are required to live within the letter and spirit of both the NGA and NGPA as Congress has directed, and we must reconcile the two in changing circumstances—in times of surplus as well as times of shortage."[10] Consistent with this necessary concession to the statutory limitations on its jurisdiction, the Commission in Order No. 436 did not assert rate-regulatory jurisdiction over gathering, but simply required pipelines to "identify" gathering costs (18 C.F.R. §284.7(d)(1)), and confined its non-discriminatory, rate-regulatory provisions to matters within the purview of its jurisdiction over transportation in interstate commerce.[11]

In today's competitive market where transportation of gas for others is the dominant source of revenues for pipelines, throughput must be maximized. This is a fundamental characteristic of open-access. As a result, the assertion of the court below that pipelines providing gathering services are discriminating against third party shippers is simply not consistent with reality.

The court below attempts to redefine the scope of the Commission's jurisdiction. However, "a *need* for federal regulation does not establish [Commission] jurisdiction that Congress has not granted." *Federal*

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[10] Order No. 436, *supra*, F.E.R.C. Stats. & Regs., Regulations Preambles, 1982-1985, at 31,487 (footnote omitted).

[11] *Id.* at 31,494.

Power Comm'n v. Louisiana Power & Light Co., 406 U.S. 621, 635-36 (1972) (emphasis in original).

CONCLUSION

For the foregoing reasons, and the reasons set forth in the Petition, INGAA respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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July 22, 1991

APPENDIX

APPENDIX A

MEMBER COMPANIES OF INTERSTATE NATURAL GAS ASSOCIATION OF AMERICA

AlaTenn Resources, Inc.
Alberta Natural Gas Company Ltd.
American Oil and Gas Corporation
Arkla Pipeline Group
Blue Dolphin Pipeline Company
The Coastal Corporation
Columbia Gas Transmission Corporation
Consolidated Natural Gas Company
Delhi Gas Pipeline Corporation
El Paso Natural Gas Company
Enron Corp.
Equitrans
Foothills Pipe Lines (Yukon) Ltd.
Granite State Gas Transmission Inc.
Great Lakes Gas Transmission Company
KN Energy, Inc.
Lone Star Gas Company
Michigan Gas Storage Company
MidCon Corp.
National Fuel Gas Supply Corporation
Northern Border Pipeline Company
Pacific Gas Transmission Company
Pacific Interstate Company
Panhandle Eastern Corporation
Public Service Company of Colorado
Questar Pipeline Company
Sonat Inc.
Tenneco Gas
TransCanada PipeLines
Transco Gas Company
United Gas Pipe Line Company
Valero Interstate Transmission Company

Valley Gas Transmission, Inc.
Westcoast Energy Inc.
The Williams Companies, Inc.
Williston Basin Interstate Pipeline Company
Wintershall Corporation

No. 91-14 (3)

Supreme Court, U.S.
FILED
SEP 3 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NORTHERN NATURAL GAS COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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20 pp

QUESTIONS PRESENTED

Whether the decisions of this Court construing Section 1(b) of the Natural Gas Act, 15 U.S.C. § 717(b) (1988) ("NGA"), to enable the Commission to regulate the rates for gathering charged by interstate pipelines in connection with jurisdictional sales service, are inapplicable as applied to jurisdictional transportation service.

PARTIES TO THE PROCEEDING

In compliance with this Court's Rule 29.1, Respondents submit a complete list of their companies, parent companies and subsidiaries which are not wholly owned subsidiaries, as follows:

CHEVRON U.S.A. INC.
- Chevron Corporation (parent)
- Atlas Supply Company
- Felix Oil Company
- Pembroke Company, Inc.

MOBIL OIL CORPORATION
- Mobil Corporation (parent)
- Buffalo River Improvement Corporation
- Canner's Steam Company, Inc.
- Collins Pipeline Company
- Felix Oil Company
- Mobil Oil De Mexico, S.A. De C.V.
- Mobil Oil Del Peru (Compania Comercial) S.A.
- Mobil Oil East Africa Limited
- Mobil Oil Guinee
- Mobil Oil Mauritanie
- Mobil Oil Nigeria Limited
- Mobil Tunisie
- Near East Development Corporation
- T & M Terminal Company
- Thums Long Beach Company

MOBIL PRODUCING TEXAS & NEW MEXICO INC.
- Mobil Corporation (parent)
- Canyon Reef Carriers, Inc.
- East Texas Salt Water Disposal Company

MOBIL OIL EXPLORATION & PRODUCING SOUTHEAST INC.

Mobil Corporation (parent)
Paloma Pipe Line Company

MOBIL EXPLORATION AND PRODUCING NORTH AMERICA INC.

Mobil Oil Corporation (parent)

TEXACO INC.

(Texaco Inc. has no parent corporation.)
Getty Oil Company
Texam Cogeneration Company
Texaco Pipeline Inc.
Texaco Exploration and Production Inc.
Texaco Refining and Marketing Inc.
Texaco Trading and Transportation Inc.
Norsk Texaco Oil A/S
S.A., Texaco Belgium N.V.
Texaco A/S
Texaco Britain Limited
Texaco Denmark Inc.
Texaco Investments (Netherlands), Inc.
Texaco (Ireland) Limited
Texaco Limited
Texaco North Sea U.K. Company
Texaco Oil Aktiebolag
Texaco Petroleum Maatschappij (Nederland) B.V.
Refineria Panama, S.A.
Refineria Texaco de Honduras, S.A.
Texaco Brasil S.A.—Productos de Petroleo
Texaco Caribbean Inc.
Texaco Nigeria Limited
Texaco Panama Inc.
Texaco Petroleum Company
Texaco Puerto Rico Inc.

Texaco Trinidad, Inc.
Texaco Chemical Company
Texaco International Financial Corporation
Texaco International Trader Inc.
Texaco Overseas Holdings Inc.
Texaco Overseas Petroleum Company
Texaco Overseas Tankship Ltd.
Canada Texaco Inc.
Four Star Oil & Gas Company
Texaco Canada Petroleum Inc.
Texaco Refining and Marketing Holdings Inc.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

91-14

NORTHERN NATURAL GAS COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

BRIEF OF PRODUCER RESPONDENTS IN OPPOSITION

STATEMENT OF INTEREST

Producer Respondents, who were active participants in the court proceeding below, are producers and marketers of natural gas who rely upon the gathering and interstate transportation facilities of Petitioner Northern Natural Gas Company ("Northern"), to transport their gas to market for sale to customers in competition with Northern's own merchant service.

Until the advent of Order No. 436, discussed below in part IV of this brief, Producer Respondents were severely handicapped in any effort to compete with interstate pipelines as merchants of gas in the interstate market. There was no "open access" transpor-

tation service whereby producers and marketers could offer a competitive alternative to a consumer's purchases from interstate pipelines. Basically, if a producer wished to make sales in interstate commerce, the viable option was to sell to the pipeline for resale by the pipeline. There were few exceptions, and those exceptions depended upon the voluntary acquiescence of the interstate pipeline in choosing to offer a transportation service.

The opinion below correctly affirms the jurisdiction of the Federal Energy Regulatory Commission ("FERC" or "Commission") to regulate the gathering rates charged by an interstate pipeline for service performed in connection with the pipeline's transportation in interstate commerce, in order to promote competition on the pipeline's system.

STATEMENT OF THE CASE

In order to avoid repetition, the statement of the case by the Solicitor General will generally be adopted. Since the Solicitor General will address all arguments of the Petitioner, this Brief in Opposition to the Petition for Writ of Certiorari is intended to be supplementary.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

ARGUMENT

I. THERE IS NO CONFLICT WITH THE STATUTE NOR THE OPINIONS OF THIS COURT.

The Petitioner acknowledges, in Section I.E. at page 14 of its Petition for Writ of Certiorari, that the Commission has jurisdiction to set the amount for gathering that an interstate pipeline can include in

rates charged for one of its two services subject to the Commission's jurisdiction—sales for resale in interstate commerce—but denies that the Commission has jurisdiction with respect to the other service—transportation in interstate commerce. Section 1(b) of the NGA, 15 U.S.C. § 717(b) (1988).

Both services can commence at the wellhead and move through gathering and transmission lines to delivery points. The basic difference in the two jurisdictional services is that with the sale for resale, the pipeline is also the gas merchant, and with transportation service, a competitor of the pipeline is the gas merchant. In both cases, the pipeline provides the transportation service from the wellhead to the delivery point.

This Court has previously held that the rates charged for the gathering portion of the transportation service included in the rate for sales for resale can be regulated by the Commission. *Colorado Interstate Gas Co. v. Federal Power Commission*, 324 U.S. 581, 603 (1945); *Federal Power Commission v. Panhandle Eastern Pipeline Co.*, 337 U.S. 498, 506 (1949); and *Interstate Natural Gas Co., Inc. v. Federal Power Commission*, 331 U.S. 682, 693 (1947).

As the court below succinctly held: "[s]ince *Colorado Interstate* permits the regulation of rates for gathering performed in connection with interstate sales, it would be inconsistent to hold that the Commission may not regulate rates for transportation over a pipeline's own gathering facilities performed in connection with admittedly jurisdictional interstate transportation." *Northern Natural Gas Company, Division of Enron Corp. v. Federal Energy Regulatory Com-*

mission, 929 F.2d 1261, 1269 (8th Cir. 1991), *petition for cert. filed*, (U.S. July 2, 1991) (No. 91-14).

The court concluded that "the agency may regulate rates charged for transportation on the pipeline's own gathering facilities performed *in connection with* jurisdictional interstate transportation." *Id.* at 1263 (emphasis in original).

This decision is correct. *Colorado Interstate* and the other relevant precedents of this Court are now over forty years old. Rates for gathering charged by interstate pipelines, such as Northern, have routinely been regulated for nearly half a century, notwithstanding the claims to the contrary of Petitioner and its trade group, the Interstate Natural Gas Association of America ("INGAA").

Since the Solicitor General will undoubtedly respond to the supplementary arguments concerning legislative history and claimed conflicts with other Courts of Appeal decisions, these points will not be here addressed.

II. THE COMMISSION HAS NOT ASSERTED SELECTIVE JURISDICTION OVER GATHERING PROVIDED BY CERTAIN "NATURAL-GAS COMPANIES."

The argument in Section III of Northern's Petition for Writ of Certiorari hinges on the fact that some sales for resale in interstate commerce are made by independent producers selling gas prior to the movement on interstate pipelines. Petition for Writ of Certiorari at 24-27. As held in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 677 (1954), such producers are "natural-gas companies." Thus the syllogism is tendered: gathering charges of "natural-gas companies" are regulated; independent producers are "natural-gas companies;" therefore gathering charges

of independent producers are regulated. If the gathering charges of independent producers are not regulated, as argued by Petitioner, a case for selective jurisdiction is claimed.

The argument is misleading. It masks the fact that there are two independent bases upon which a person can become a "natural-gas company:" sales for resale service in interstate commerce and, independently, transportation service in interstate commerce. This distinction was made clear in the *Phillips* decision noted above. An independent producer does not provide the service of transportation in interstate commerce subject to the jurisdiction of the Commission.[1]

Thus, the syllogism, to be accurate, must be split into two propositions: one dealing with transportation in interstate commerce and the other dealing with sales for resale in interstate commerce. With respect to the transportation jurisdiction, gathering charges of "natural-gas companies" providing the service of transportation in interstate commerce subject to the jurisdiction of the Commission are regulated; independent producers are not "natural-gas companies" providing the service of transportation in interstate commerce subject to the jurisdiction of the Commission; therefore gathering charges of independent pro-

[1] An "independent producer" as that term is used in this part means any person as defined in the Natural Gas Act who is engaged in the production or gathering of natural gas and who sells natural gas in interstate commerce for resale, but who is not engaged in the transportation of natural gas (other than gathering) by pipeline in interstate commerce.

18 C.F.R. § 154.91(a) (1991).

ducers are not properly regulated. There is no selective jurisdiction issue presented.

With respect to the sales for resale jurisdiction, the gathering charges for "natural-gas companies" making sales for resale in interstate commerce are regulated; independent producers are "natural-gas companies" making sales for resale in interstate commerce; therefore gathering charges of independent producers should be regulated, and, in fact, are regulated, to the extent that independent producer sales for resale are still subject to the jurisdiction of the Commission. Again, there is no issue of selective regulation.

For sales for resale in interstate commerce by independent producers still subject to federal price controls, the Commission does regulate the amount of gathering costs that can be included in the sale for resale rate. An allowance for gathering costs was included in the base rates calculated by the Commission, and provision was made to secure a higher allowance for gathering pursuant to Section 110 of the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. § 3320 (1988).

What Petitioner Northern and INGAA fail to state is that the Congress has already decided to deregulate sales for resale in interstate commerce when made by independent producers. Partial deregulation was achieved in the NGPA of 1978. For those deregulated sales, producers are no longer "natural-gas companies." Full deregulation will occur on January 1, 1993 by operation of the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157 (codified in scattered sections of 15 U.S.C.).

Thus, even though there is no merit in the Northern and INGAA claims, the issue of independent producers being "natural-gas companies" will be moot in the near future. To the extent that the issue is not yet moot, producer gathering charges are regulated pursuant to Section 110 of the NGPA, for those sales of gas which still remain under price controls.

Thus, there is no issue of selective jurisdiction.

III. PETITIONER'S CLAIM THAT THE COURT BELOW "EXTENDED" JURISDICTION TO AFFILIATES INTERCONNECTED WITH INTERSTATE PIPELINES WHICH PROVIDED GATHERING SERVICE IS INACCURATE.

In *Colorado Interstate*, this Court directly addressed the gathering costs of the interstate pipeline *and* its affiliates, including Canadian River Gas Company ("Canadian"). Canadian owned gathering and transmission lines as well as natural gas production. Although owned by a separate affiliate, the affiliate and the pipeline operated as a single enterprise. This Court upheld the regulation of the rates charged by the interstate pipeline, including that portion attributable to the affiliate. 324 U.S. at 596-97.

The court below applied this precedent. *Northern Natural*, 929 F.2d at 1270. Thus, there was no "extension" of jurisdiction to affiliates by the court below.

IV. REVERSAL OF THE DECISION BELOW WOULD UNDERMINE THE COMMISSION'S EFFORT TO MITIGATE THE MONOPSONY AND MONOPOLY POWER OF PUBLIC UTILITIES PROVIDING THE SERVICE OF TRANSPORTATION OF NATURAL GAS IN INTERSTATE COMMERCE.

This case was precipitated, not by the Commission seeking for the first time to regulate the gathering

rates of Northern, but by Northern seeking to deregulate its own gathering rates by refusing to file gathering rates in a newly-filed rate case and asserting the right to charge shippers whatever Northern pleased.

This development, in turn, was precipitated by the Commission's Order No. 436[2], which sought to induce interstate pipelines to relinquish their virtual monopoly over sales of gas in interstate commerce and pro-

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[2] *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, Order No. 436, F.E.R.C. Stats. and Regs., [Regulations Preambles 1982-1985] (CCH) ¶ 30,665 (1985), *vacated and remanded sub nom. Associated Gas Distributors v. Federal Energy Regulatory Commission*, 824 F.2d 981 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988), *repromulgated as* Order No. 500, III F.E.R.C. Stats. and Regs. (CCH) ¶ 30,761 (1987), *modified*, Order No. 500-A, III F.E.R.C. Stats. and Regs. (CCH) ¶ 30,770 (1987), *modified further*, Order No. 500-B, F.E.R.C. Stats. and Regs. (CCH) ¶ 30,772 (1987), *modified further*, Order No. 500-C, III F.E.R.C. Stats. and Regs. (CCH) ¶ 30,786 (1987), *modified further*, Order No. 500-D, III F.E.R.C. Stats. and Regs. (CCH) ¶ 30,800 (1988), *reh'g denied*, Order No. 500-E, 43 F.E.R.C. (CCH) ¶ 61,234 (1988), *modified further*, Order No. 500-F, III F.E.R.C. Stats. and Regs. (CCH) ¶ 30,841 (1988), *reh'g denied*, Order No. 500-G, 46 F.E.R.C. (CCH) ¶ 61,148 (1989), *vacated and remanded, American Gas Association v. Federal Energy Regulatory Commission*, 888 F.2d 136 (D.C. Cir. 1988), Order No. 500-H, III F.E.R.C. Stats. and Regs. ¶ 30,867 (1989), *reh'g granted in part and denied in part*, Order No. 500-I, III F.E.R.C. Stats. and Regs. ¶ 30,880 (1990), *aff'd in part and remanded in part, American Gas Association v. Federal Energy Regulatory Commission*, 912 F.2d 1496 (D.C. Cir. 1990), *order on remand*, Order No. 500-J, III F.E.R.C. Stats. and Regs. (CCH) ¶ 30,915 (1991), *reh'g denied*, Order No. 500-K, 55 F.E.R.C. (CCH) ¶ 61,489 (1991), *appeal docketed sub nom. ANR Pipeline Company v. Federal Energy Regulatory Commission*, Docket No. 91-1386 (D.C. Cir. August 15, 1991).

vide "open access" transportation to third party shippers selling gas in competition with the pipeline as gas merchant. The Court of Appeals for the D.C. Circuit has characterized this movement toward open, nondiscriminatory access as perhaps one of "the three great regulatory milestones of the industry." *Associated Gas Distributors v. Federal Energy Regulatory Commission*, 824 F.2d 981, 993 (D.C. Cir. 1987), *cert. denied*, 485 U.S. 1006 (1988).

As a part of the "open access" program, the Commission called upon interstate pipelines, if they elected to offer open access transportation, to "unbundle", or separately state, their gathering rates from the remaining transportation rates for a movement of gas in interstate commerce. That is, rather than post a single rate for the transportation of gas from the wellhead to the delivery point, the rate posted would show a component for gathering and a component for the remaining transportation. In part, this had the salutary effect of making it possible for a shipper to avoid paying a gathering rate when the pipeline's gathering facilities were not utilized by the shipper, thus avoiding cross-subsidization.

This result was encompassed in the regulations duly promulgated and now codified in 18 C.F.R § 284.7(d)(1) (1991), which states in pertinent part, "any rate filed for service subject to this section . . . must separately identify cost components attributable to transportation, storage, and gathering costs."

The Commission's Order No. 436 establishing "open access" was appealed to the Court of Appeals for the D.C. Circuit in the *Associated Gas Distributors* decision, and Northern was a party. As the court's opinion reflects, there was no challenge by Northern or

any other party on the grounds at issue in the present case. The present case may be viewed as a collateral attack on the Commission's open access regulations at 18 C.F.R. § 284.7(d)(1) (1991).

As the court below stated, "permitting a pipeline to manipulate the otherwise unregulated charges for gathering services performed over its own facilities in connection with jurisdictional interstate transportation, would, in effect, permit the pipeline to establish rates for the interstate transportation." *Northern Natural*, 929 F.2d at 1270. This result would totally circumvent the Commission's statutory mandate to ensure that rates, terms and conditions, are just and reasonable. Sections 4 and 5 of the NGA, 15 U.S.C. §§ 717c and 717d (1988).

CONCLUSION

What is at stake is whether the interstate pipelines can secure a partial restoration of their monopoly and monopsony power by being able to exact, at the gathering stage, such high rates as to render the regulation of the transportation of gas in interstate commerce a hollow formality for those captive to a pipeline gathering system. This will dampen, if not severely restrict, viable competition with interstate natural gas pipelines with respect to sales for resale in interstate commerce.

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

NORTHERN NATURAL GAS COMPANY, PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Energy Regulatory Commission reasonably concluded that, in the exercise of its power to establish just and reasonable rates "in connection with the transportation * * * of natural gas" in interstate commerce under Sections 4 and 5 of the Natural Gas Act (NGA), 15 U.S.C. 717c and 717d, the Commission may regulate rates that a natural-gas company charges for gathering gas for the purpose of transporting it interstate, notwithstanding the exclusion of the "gathering of natural gas" from the provisions of the NGA under Section 1(b), 15 U.S.C. 717(b).

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BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-29a) is reported at 929 F.2d 1261. The opinions of the Federal Energy Regulatory Commission are reported as follows: Order Approving Contested Offer of Settlement as Modified (Pet. App. 30a-32a), 37 F.E.R.C. ¶ 61,272; Order Granting in Part and Denying in Part Rehearing and Granting Clarification (Pet. App. 33a-35a), 41 F.E.R.C. ¶ 61,158; Letter Order (Pet. App. 38a-39a), 43 F.E.R.C. ¶ 61,158; Order Denying Appeal of Staff Action and Denying Rehearing (Pet. App. 40a-47a), 43 F.E.R.C. ¶ 61,473; and Order Denying Rehearing (Pet. App. 48a-56a), 44 F.E.R.C. ¶ 61,384. A Letter Order dated January 28, 1988, issued by the Commission's staff (Pet. App. 36a-37a), is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 4, 1991. The petition for a writ of certiorari was filed on July 2, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Pursuant to the Natural Gas Act (NGA), ch. 556, 52 Stat. 821, 15 U.S.C. 717 *et seq.*, the Federal Energy Regulatory Commission (FERC) regulates the transportation of natural gas in interstate commerce, the sale in interstate commerce of natural gas for resale, and natural-gas companies.[1] Sections 4 and 5 of the NGA, 15 U.S.C. 717c and 717d, require FERC to establish "just and reasonable" rates "for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission."[2] 15 U.S.C. 717c(a). The jurisdiction of the Commission is described in Section 1(b) of the NGA, which states:

> The provisions of [the NGA] shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of

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[1] A "natural-gas company" is defined as a "person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale." 15 U.S.C. 717a(6).

[2] These responsibilities were formerly exercised by FERC's predecessor, the Federal Power Commission (FPC), whose functions were transferred to FERC pursuant to the Department of Energy Organization Act, Pub. L. No. 95-91, 91 Stat. 565, and Exec. Order No. 12,009, 3 C.F.R. 142 (1978). References in this brief to FERC also include the FPC.

> natural gas for resale * * *, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

15 U.S.C. 717(b).

The "production or gathering of natural gas," excluded from the application of the NGA by Section 1(b), refers to "the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution." *Northern Natural Gas Co.* v. *State Corp. Comm'n*, 372 U.S. 84, 89-90 (1963).[3] Traditionally, in setting the rate that a pipeline may charge for the jurisdictional sale of gas, FERC has included in the rate base all costs that underlie the sale, including the cost of gathering as performed by the pipeline. This Court has upheld FERC's authority to use that approach, rejecting the claim that it constitutes regulation of gathering in violation of Section 1(b). *Colorado Interstate Gas Co.* v. *FPC*, 324 U.S. 581, 600 (1945); *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672 (1954).

b. Prior to enactment of the Natural Gas Policy Act of 1978 (NGPA), Pub. L. No. 95-621, 92 Stat. 3350, 15 U.S.C. 3301 *et seq.*, interstate pipeline companies primarily operated as wholesalers of gas, selling the gas either to distributors for resale or to end-

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[3] As explained by the court of appeals, "gathering" is the process by which a producer, pipeline, or other company collects natural gas from wells at the point of production and moves it through a network of pipelines to a collection point for subsequent transportation through a pipeline's principal transmission system. Pet. App. 9a.

users. In those sales, gas and transportation were provided at a single "bundled" rate. Pet. App. 4a. The NGPA substantially loosened regulation of the wellhead prices of gas in order "to give market forces a more significant role in determining the supply, the demand, and the price of natural gas." *Transcontinental Gas Pipe Line Corp.* v. *State Oil & Gas Bd.*, 474 U.S. 409, 422 (1986) (*Transco*).[4] As a result, some customers of interstate pipelines began purchasing gas directly from producers or other sellers and then used the pipelines solely to transport the gas to them. See, *e.g.*, Pierce, *Reconsidering the Roles of Regulation and Competition in the Natural Gas Industry*, 97 Harv. L. Rev. 345, 348 (1983).

Partially in response to that trend, in 1985, FERC adopted Order No. 436,[5] which "envisage[d] a com-

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[4] Congress further implemented that policy through the Natural Gas Wellhead Decontrol Act of 1989, Pub. L. No. 101-60, 103 Stat. 157, which amended the NGPA and eliminated all wellhead price controls by January 1, 1993.

[5] Order No. 436, *Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol*, 50 Fed. Reg. 42,408 (1985) (codified as amended in scattered sections of 18 C.F.R. Pts. 2, 157, 284, 375, 381), reh'g granted in part and denied in part, Order No. 436-A, 50 Fed. Reg. 52,217 (1985), reh'g granted in part, Order No. 436-B, 51 Fed. Reg. 6398 (1986), reh'g denied, Order No. 436-C, 51 Fed. Reg. 11,566 (1986), reh'g denied, Order No. 436-D, 51 Fed. Reg. 11,569 (1986), reconsideration denied, Order No. 436-E, 51 Fed. Reg. 11,566 (1986), vacated and remanded *sub nom. Associated Gas Distributors* v. *FERC*, 824 F.2d 981 (D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988), readopted on an interim basis on remand, Order No. 500, 52 Fed. Reg. 30,334 (1987), extension granted, Order No. 500-A, 52 Fed. Reg. 39,507 (1987), modified, Order No. 500-B, 52 Fed. Reg. 39,630 (1987), modified further, Order No. 500-C, 52 Fed. Reg. 48,986 (1987), modified further, Order No. 500-D, 53 Fed. Reg. 8439 (1988), reh'g denied, Order No. 500-E, 53 Fed. Reg. 16,859 (1988),

plete restructuring of the natural gas industry." *Associated Gas Distributors* v. *FERC*, 824 F.2d 981, 993 (D.C. Cir. 1987), cert. denied, 485 U.S. 1006 (1988). In order No. 436, the Commission instituted a program to encourage open access to all major pipelines, so that local distributing companies and other pipeline customers could purchase gas directly from producers. The Commission found that the pipelines' practice of refusing to transport gas in competition with their own sales was unduly discriminatory because it denied consumers access to gas at the lowest reasonable prices. The Commission also found that the practice was frustrating the NGPA's goal of relying on a competitive wellhead market in reducing prices. See Pet. App. 4a-5a.

To encourage the competitive benefits of having pipelines transport natural gas that customers had purchased from others, Order No. 436 allowed a pipeline to obtain a "blanket certificate" of public convenience and necessity under Section 7(c) of the NGA, 15 U.S.C. 717f(c), authorizing the pipeline to transport natural gas without obtaining prior Commision approval of each transportation arrangement. FERC noted that the NGPA had left a "generally competitive market" for natural gas and had made gas "a separate and distinct economic *commodity*," separate from transportation and other services provided by pipelines. 50 Fed. Reg. 42,412,

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modified further, Order No. 500-F, 53 Fed. Reg. 50,924 (1988), reh'g denied, Order No. 500-G, 54 Fed. Reg. 7400 (1989), remanded, *American Gas Ass'n* v. *FERC*, 888 F.2d 136 (D.C. Cir. 1989), readopted, Order No. 500-H, 54 Fed. Reg. 52,344 (1989), modified, Order No. 500-I, 55 Fed. Reg. 6605 (1990), aff'd in part and remanded in part, *American Gas Ass'n* v. *FERC*, 912 F.2d 1496 (D.C. Cir. 1990), cert. denied, 111 S. Ct. 957 (1991), stayed in part on remand, Order No. 500-J, 56 Fed. Reg. 6992 (1991).

42,413 (1985). But in many geographic markets, pipelines remained monopoly providers of transportation service. Therefore, if a pipeline offered transportation service under a blanket certificate, Order No. 436 requires it to provide transportation service without undue discrimination or preference. 18 C.F.R. 284.8(b). See 50 Fed. Reg. 41,421, 42,424-42,425, 42,430 (1985).

2. a. Petitioner Northern Natural Gas Company (Northern) is an interstate pipeline company regulated as a natural-gas company under the NGA. In 1985, Northern filed a proposed rate tariff for open-access transportation. The tariff did not set forth rates for gathering provided in connection with that transportation, as required by Order No. 436. In response to objections by FERC's trial staff and several of Northern's customers, Northern replied that it would charge for gathering separately and urged that Section 1(b) of the NGA did not give the Commission jurisdiction to require that a gathering rate be filed. In approving a contested offer of settlement, the Commission required Northern to reflect its gathering rates in its tariff sheets. Pet. App. 30a-32a. The Commission noted that Order No. 436 requires an open-access transportation tariff to "separately identify cost components attributable to transportation, storage, and gathering costs," 18 C.F.R. 284.7 (d)(1), and that if Northern were required to state its rates for gathering in its transportation tariff, "potential shippers will be apprised of the full cost of the services they intend to purchase." Pet. App. 32a, 33a-35a.

Northern then filed a tariff sheet setting forth gathering rates, but with a footnote declaring that those rates were "[p]rovided for informational pur-

poses only and not as a limitation of prices which may be charged or to imply recognition of or assent to Commission jurisdiction over such activities." Pet. App. 57a. The Commission's staff rejected that filing because the gathering rates were not derived from gathering costs and, by virtue of the footnote, were not "stated rates" binding on Northern. *Id.* at 36a-37a. Northern appealed this order to the Commission but filed a new tariff sheet omitting the footnote, *id.* at 58a, which the Commission accepted for filing as complying with its orders. *Id.* at 38a-39a.

b. The Commission denied Northern's appeal of the order rejecting the footnoted tariff sheet and its request for rehearing of the order accepting the tariff sheet without the footnote. Pet. App. 40a-47a. FERC concluded that "Congress's grant to the Commission of jurisdiction over the rates * * * for services ancillary to the transportation and sale of natural gas in interstate commerce includes the authority to determine the justness and reasonableness of the rates * * * of Northern's gathering services here at issue." *Id.* at 44a.[6]

The Commission explained that its power to determine the justness and reasonableness of the rates for Northern's gathering service derives from Sections 4(a) and 5(a) of the NGA, 15 U.S.C. 717c(a), 717d(a). Pet. App. 42a. Those provisions, the Commission observed, authorize it to regulate not only the rates charged "for" the transportation or sale of gas within its jurisdiction, but also the rates charged "in connection with" such transportation or sale. *Id.* at 43a. The Commission concluded that "the gather-

[6] The Commission thus found it unnecessary to determine whether Northern's service was, in fact, "gathering" within the meaning of Section 1(b) of the NGA. Pet. App. 42a, 44a.

ing here at issue is provided in connection with Northern's open-access transportation" under Order No. 436, and is therefore subject to FERC regulation. Pet. App. 44a-45a. The Commission also pointed out that if it did not have jurisdiction over the rates for gathering, "there would be a gap in the regulation of gas in interstate commerce, contrary to Congress's intent." *Id.* at 44a. Reiterating the findings it made in Order No. 436, the Commission further stated that "excessive rates for gathering services provided in connection with open-access transportation could be used as a barrier to open-access transportation and would also defeat the goal of lower prices to consumers." *Id.* at 45a.[7]

In denying rehearing, the Commission again rejected Northern's contention that Section 1(b) excludes Northern's gathering rates from its jurisdiction. Pet. App. 48a-56a. The Commission stated that Northern's argument "ignores the distinction drawn between state jurisdiction over the physical activity of gathering and federal jurisdiction over the rates charged for gathering provided in connection with jurisdictional sales and transportation." *Id.* at 55a. The Commission responded to Northern's contention that it had not previously regulated gathering rates

[7] The Commission took note of Northern's reliance on the Section 1(b) gathering exemption, but found that "[a]t most," that Section would "exempt Northern's gathering service and facilities from NGA Section 7 certificate jurisdiction." Pet. App. 42a. The Commission explained that this Court had construed the gathering exemption "to apply to non-price matters such as the 'physical activities, facilities, and properties used in the . . . gathering of natural gas.' " *Id.* at 46a (quoting *Interstate Natural Gas Co.* v. *FPC*, 331 U.S. 682, 690 (1947)). The exemption, therefore, did not apply to price regulation under Sections 4 and 5. Pet. App. 46a-47a.

by noting that pipelines had in the past "served primarily as merchants of natural gas" and "[t]he cost of gathering was rolled into the interstate pipelines' sales for resale rates." Accordingly, "there was no need to give special scrutiny to gathering rates or service apart from regulation of the sales rates." *Ibid.* But because pipelines had since become primarily transporters of natural gas, the Commission explained, it "must now separately scrutinize the rates charged for gathering performed in connection with transportation in order to insure that the Commission's policies underlying open-access transportation remain intact." *Id.* at 55a-56a.

3. The court of appeals upheld the Commission's orders, determining that the Commission has authority under Sections 4 and 5 of the NGA to regulate the rates Northern charges for gathering performed through its own facilities in connection with transportation in interstate commerce. Pet. App. 1a-29a.

The court of appeals found the circumstances in this case to be "nearly identical" to those in *Colorado Interstate Gas Co.* v. *FPC*, *supra*. Pet. App. 27a. There, the court noted, this Court sustained "the regulation of rates for gathering performed in connection with interstate sales," notwithstanding the exclusion of gathering from FERC's jurisdiction in Section 1(b) of the NGA. Pet. App. 18a. Given that ruling, "it would be inconsistent to hold that the Commission may not regulate rates for transportation over a pipeline's own gathering facilities performed in connection with admittedly jurisdictional interstate transportation." *Ibid.* The court explained that if a pipeline could set an unregulated rate for such gathering, it could effectively establish its own rates for interstate transportation. That result

would allow the pipeline to prefer its gas sales over the transportation of gas for others, thereby thwarting the procompetitive purposes of Order No. 436, the NGA, and the NGPA. Pet. App. 19a, 20a.

The court also found no justification in Section 1(b)'s gathering exemption for setting aside the Commission's orders in this case. That exemption, the court explained, is "confined * * * to matters of state and local concern" involving the physical acts of drawing gas from the ground and channeling it for initial distribution. Pet. App. 21a-22a. Nor did the court find that *Colorado Interstate*'s reading of Section 1(b) was undercut by any of this Court's later decisions interpreting the gathering exemption. Pet. App. 21a-24a. Finally, the court concluded that its holding does not conflict with the Tenth Circuit's decision in *Northwest Pipeline Corp.* v. *FERC*, 905 F.2d 1403 (1990), because that case involved a different issue—whether certain pipeline facilities were "gathering" or "transportation" facilities. Pet. App. 25a-26a. The court noted that the Tenth Circuit had remanded for further consideration of that issue, while "[d]eclining to address" whether the Commission has authority under Sections 4 and 5 of the NGA to regulate a pipeline's gathering rates in connection with its interstate transportation. Pet. App. 25a-26a.[8]

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[8] The court also rejected Northern's contention that the Commission's regulation of Northern's gathering rates in connection with its interstate transportation constituted "discriminatory treatment," inasmuch as gathering performed by producers or independent gatherers was not similarly regulated. Pet. App. 27a. The court pointed out that because no producers or independent gatherers were before the court, it did not have to determine whether they were subject to regulation under Sections 4 and 5. Pet. App. 27a. Moreover, the

ARGUMENT

The court of appeals correctly held that the Commission, in regulating the transportation of natural gas in interstate commerce, has the authority to regulate the rates charged by a pipeline for gathering natural gas in connection with that transportation. The holding follows logically from this Court's decision in *Colorado Interstate* and is fully consistent with the statutory framework of the NGA and this Court's interpretation of the NGA's gathering exemption. Contrary to petitioner's contention, the court of appeals' decision does not conflict with any decision of this Court or of any other court of appeals. Review therefore is not warranted.

1. Petitioner contends (Pet. 4-16) that the gathering exemption in Section 1(b) provides complete immunity from FERC regulation of its gathering rates under Sections 4 and 5 of the NGA, even though petitioner's gathering is performed over its own lines in connection with interstate transportation and the Commission is regulating neither gathering facilities nor the physical activity of gathering. That contention is based on a misreading both of the applicable provisions of the NGA and of this Court's holding in *Colorado Interstate.*

a. FERC's jurisdiction in this case is grounded in the fact that petitioner's gathering rates are integrally tied to its transportation of gas in interstate commerce. Section 4(a) of the NGA provides:

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court noted, the Commission had explained that producers are regulated under separate provisions, and independent gatherers do not have the same power to engage in anticompetitive abuses as pipelines performing both transportation and gathering. *Id.* at 28a.

> All rates and charges made, demanded, or received by any natural-gas company for *or in connection with* the transportation or sale of natural gas subject to the jurisdiction of the Commission * * * shall be just and reasonable.

15 U.S.C. 717c(a) (emphasis added). Section 5(a) provides that the Commission may determine and prescribe the "just and reasonable rate" whenever it finds that

> any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company *in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission* * * * is unjust, unreasonable, unduly discriminatory, or preferential.

15 U.S.C. 717d(a) (emphasis added). Petitioner's gathering rates come within the reach of these provisions because they are set "in connection with" natural-gas transportation that is unquestionably within the Commission's jurisdiction to regulate under Section 1(b). See 15 U.S.C. 717(b) (NGA applies to "transportation of natural gas in interstate commerce"). The power to regulate rates "in connection with" jurisdictional transportation supplements FERC's power to regulate rates "for" such transportation. 15 U.S.C. 717c(a). As the court of appeals explained, petitioner's gathering services are rendered as part of a continuous flow of gas over its own facilities, and the gathering is required to accomplish a single act of transportation of gas in interstate commerce. Pet. App. 25a. Regulation of gathering rates is not only justified by the NGA, it is "essential to prevent discrimination against third-party gas in interstate transportation and sales." *Ibid.* See 15 U.S.C. 717d(a) (prohibiting unduly discriminatory or preferential rates).

The "gathering" exemption in Section 1(b) does not preclude FERC's jurisdiction over rates under Sections 4 and 5. In relying on the "express language" of Section 1(b), Pet. 4-6, petitioner ignores the fact that, in keeping with the recognition that "[e]xceptions to the primary grant of jurisdiction * * * are to be strictly construed," *Interstate Natural Gas Co.* v. *FPC*, 331 U.S. 682, 690-691 (1947), this Court "has consistently held that 'production' and 'gathering' are terms narrowly confined to the physical acts of drawing the gas from the earth and preparing it for the first stages of distribution." *Transco*, 474 U.S. at 418 (quoting *Northern Natural Gas*, 372 U.S. at 90). See *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, 678 (1954) ("exemption applies to the physical activities, facilities, and properties used in the production and gathering of natural gas"); *Interstate Natural Gas*, 331 U.S. at 690 (gathering exemption "reserve[s] to the States * * * the power to regulate the physical production and gathering of natural gas in the interests of conservation or of any other consideration of legitimate local concern"); *Colorado Interstate*, 324 U.S. at 602-603 (exemption applies to "activity of producing or gathering natural gas"). The Commission is not regulating the physical activities or facilities of gathering in this case, nor is it trenching on an area of local concern. Rather, the Commission is regulating gathering rates when a pipeline gathers gas in connection with its interstate transportation. No decision of this Court holds that such regulation runs afoul of the gathering exemption. Indeed, this Court's decision in *Colorado Interstate*, by allowing the Commission to set the amount of gathering costs to be included in the rate base for jurisdictional sales, firmly establishes that the Commission's regulation of petitioner's gath-

ering rates is consistent with the gathering exemption.[9]

Thus, the Commission's regulation of the gathering rates at issue here is clearly authorized by the NGA. Even if the provisions of the NGA were more ambiguous on the point, the Commission's interpretation of Sections 1(b), 4, and 5 to apply to petitioner's gathering is reasonable and is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources De-*

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[9] Petitioner suggests in passing (Pet. 6-7) that the legislative history suports its broad view of the gathering exemption, but cites only cases discussing Congress's general intention to preserve state regulation over gathering. The traditional domain of state regulation, however, does not extend to dictating the rate-of-return on gathering services performed in connection with jurisdictional sales or transportation. See pp. 18-20, *infra*. The Interstate Natural Gas Association of America (INGAA) does canvass the legislative history (Br. 5-7), but fails to mention that this same material was before the Court in *Colorado Interstate*. There, the Court was not persuaded that Congress intended to prevent the Commission from determining the costs allocable to gathering when it established a rate-base for interstate sales; the dissent took a contrary view of the legislative history. See 324 U.S. at 599-600; *id.* at 621, 623 (Stone, C.J., dissenting). There is no reason for the Court to revisit that dispute. Cf. *California* v. *FERC*, 110 S. Ct. 2024, 2033 (1990). In any event, the statement by FPC Solicitor DeVane, cited by INGAA (Br. 6), that the Commission would not have jurisdiction over "gathering rates" was not addressed to the situation that the Commission confronted here of an integrated pipeline-gatherer establishing putatively separate rates for what is in reality a single act of interstate transportation. Indeed, DeVane recognized that the Commission, in regulating a pipeline's sales rates, would *not* be bound by the gathering price paid by a pipeline "if the transaction was not at arm's length." *Natural Gas: Hearing on H.R. 11662 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce*, 74th Cong., 2d Sess. 42-43 (1936).

fense Council, Inc., 467 U.S. 837, 842-845 (1984). See *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distribution Cos.*, 111 S. Ct. 615, 624 n.5 (1991).

b. The conclusion that the Commission has authority over petitioner's gathering rates here is also compelled by *Colorado Interstate*. In that case, the Court held that Section 1(b) "does not preclude the Commission from reflecting the production and gathering facilities of a natural gas company in the rate base and determining expenses incident thereto for the purposes of determining the reasonableness of rates subject to its jurisdiction." 324 U.S. at 603. As a matter of substance, the Commission is doing nothing more here by regulating the gathering rates that petitioner offers to customers purchasing petitioner's interstate transportation services, where the transaction requires that the gas be moved through petitioner's own gathering facilities.

The companies in *Colorado Interstate* sold gas for resale in interstate commerce; one of them (Canadian) also produced and gathered the gas. 324 U.S. at 585. Claiming that the Commission was improperly "regulat[ing] the production and gathering of natural gas," contrary to Section 1(b), Canadian objected to the inclusion of its production and gathering costs in the rate base used to determine its interstate-sales rates. 324 U.S. at 597. Canadian insisted that the proper approach was for the Commission to accept, as one of Canadian's operating expenses, the "fair field price" or "fair market value" of the gas that was gathered and channeled into "the transmission lines for interstate transportation and sale." *Id.* at 600.[10] This Court held that because the

[10] The dispute effectively concerned the rate that Canadian could charge for its gathering operations as used in inter-

gathering charge was reflected in the ultimate price paid by the purchaser in a transaction that the Commission had jurisdiction to regulate, the Commission also had authority to determine what value could be assigned in the rate base to gathering facilities and expenses. *Id.* at 600, 603. The Court rejected the contention that the gathering exemption precluded that approach, stating that Section 1(b) "must be reconciled with the explicit provisions [of the NGA] which describe the normal conventions of rate-making." 324 U.S. at 602.

The rationale of *Colorado Interstate* governs this case. As the court of appeals explained, "[f]or the Commission to regulate separately stated rates for gathering over the pipeline's own gathering lines performed *in connection with* further jurisdictional interstate transportation is the substantial equivalent of the control of rates for gathering upheld in *Colorado Interstate*." Pet. App. 17a-18a. Petitioner's effort to distinguish *Colorado Interstate* relies on an artificially narrow reading of the decision. Petitioner points out that its gathering rate is stated separately from its transportation rate; in petitioner's view (Pet. 14), "[t]he critical consideration in *Colorado Interstate* is the fact that the jurisdictional sales rate at issue therein *included* both the cost of jurisdictional transportation and an allocation of the costs of nonjurisdictional production and gathering." But, as the court of appeals explained, petitioner's statement of separate rates for gathering

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state sales. The Commission allowed Canadian a 6 1/2 percent return on its rate base; the inclusion of gathering *costs* rather than *market value* substantially reduced Canadian's rate of return on its gathering operations. See 324 U.S. at 588, 597.

and transportation does not alter the fact that petitioner is offering a single, integrated service:

> It is insignificant that transportation rather than sale is the service involved [in this case] or that the rate for gathering is to be stated separately rather than "bundled." Stating the gathering rate separately from the related jurisdictional transportation rate does not magically "unbundle" the actual gathering activity performed over the pipeline's own facilities in connection with continuing interstate transportation.

Pet. App. 27a.[11]

In *Colorado Interstate* the pipeline's interstate *sale* of natural gas represented a bundle of goods and services (the production and gathering of the gas, plus transportation to the purchaser); here, the Commission determined that petitioners' interstate *transportation* of natural gas likewise represents a bundle of services, albeit with different components (the

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[11] Petitioner quotes out of context (Pet. 12) the statement in *Colorado Interstate* that "the authority of the Commission to suspend rates is restricted to rates over which it has jurisdiction." 324 U.S. at 596. The point of that statement was that a proviso in Section 4(e) of the NGA that barred the Commission from suspending the rate for "gas sold for resale for industrial use" confirmed that such sales were within the Commission's jurisdiction; otherwise, "the proviso in § 4(e) would be unnecessary." 324 U.S. at 596. The Court did not state that gathering rates that are integral to interstate transportation or sale are beyond the Commission's regulatory jurisdiction. Moreover, when the Court did turn to the gathering exemption, it held that the Commission could establish the cost of gathered gas—and thereby effectively determine its "rate"—in the rate base for a jurisdictional sale. *Id.* at 601.

gathering of the gas plus transportation to the purchaser). In each case, the Commission has the power to regulate the *total* price of the bundle of products and services; the pipeline is not free to escape that regulation by unbundling one integrally related service and then charging whatever the market will bear. To hold otherwise would "permit the *pipeline* to establish rates for the interstate transportation." Pet. App. 19a. Just as Section 1(b) did not shield gathering from regulation in *Colorado Interstate*, it cannot shield petitioner's gathering from regulation in this case.

c. Petitioner errs in contending (Pet. 7-9) that the decision below conflicts with *FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498 (1949). In *Panhandle Eastern*, the Court held that the production and gathering exemption includes "facilities" as well as "activities," and thereby prevents the Commission from barring an interstate pipeline from selling part of its undeveloped gas reserves. *Id.* at 504-505. Here, by contrast, FERC has not exerted control over the "facilities" of gathering; it has regulated rates for gathering undertaken in connection with jurisdictional transportation.[12] *Panhandle East-*

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[12] Petitioner cannot obtain the protection of the gathering exemption simply because its gathering facilities are "affected" by rate regulation. See Pet. 9-10. In *Colorado Interstate*, the Court rejected the same argument when it acknowledged that the Commission's consideration of the costs of "producing properties and gathering facilities has of course an indirect effect on them." 324 U.S. at 603. As the Court later observed in *Interstate Natural Gas Co.* v. *FPC*, 331 U.S. 682, 691 (1947), "[i]t is not sufficient to defeat the Commission's jurisdiction over sales for resale in interstate commerce to assert that in the exercise of the power of rate regulation in such cases, local interests may in some degree be affected."

ern specifically recognized that the Commission's use of production and gathering cost data to fix rates does not violate the gathering exemption. *Id.* at 506 (citing *Colorado Interstate*, 324 U.S. at 602).[13]

Nor does the court of appeals' decision conflict with this Court's cases construing Section 1(b) to reserve a zone of regulatory authority to the States. See Pet. 11-12. In *Northwest Central Pipeline Corp.* v. *State Corp. Comm'n*, 489 U.S. 493, 511 (1989), the Court held that Section 1(b) allows a State to regulate the "proration of gas production in aid of conservation and the protection of correlative rights." The Court, however, did not hold that the financial return from gathering provided as a component of interstate transportation is subject only to state regulation; to the contrary, the Court reaffirmed that the production-and-gathering exemption relates to "the physical acts of drawing gas from the earth and preparing it for the first stages of distribution." *Id.* at 510.

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[13] It is not anomalous, as petitioner contends (Pet. 9), that this interpretation of *Panhandle Eastern* produces something of a "split" application of the NGA, under which FERC has jurisdiction over certain gathering rates under Sections 4 and 5 of the NGA, where integrally related to the interstate transportation or sale of gas, but has no certification or abandonment jurisdiction over the gathering facilities and services themselves under Section 7, 15 U.S.C. 717f. That result is consistent with this Court's view that Section 1(b) removes only the "*physical* activities, facilities, and properties used in production and gathering" from the Commission's jurisdiction. *Phillips Petroleum*, 347 U.S. at 678 (emphasis added). Moreover, it is well settled that a finding that FERC has rate jurisdiction over an activity does not require that the Commission have certificate jurisdiction. *Mid-America Pipeline Co.* v. *FPC*, 330 F.2d 226, 228-229 (D.C. Cir. 1964); Pet. App. 47a n.20.

Moreover, where, as here, a pipeline company effectively bundles gathering service with interstate transportation or sales for resale, state regulation of the gathering service is impracticable.[14] See *Phillips Petroleum*, 347 U.S. at 682-685; *Interstate Natural Gas*, 331 U.S. at 692-693. To our knowledge no state regulatory body has asserted jurisdiction over the gathering rates at issue here, and petitioner does not contend that FERC regulation is inconsistent with state law. See *Interstate Natural Gas*, 331 U.S. at 691-692. Indeed, state regulation of petitioner's rates for services so integrally related to interstate transportation of gas would enter the field of rate regulation reserved to FERC. Cf. *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 308 (1988).

d. Finally, petitioner claims (Pet. 4, 16) that FERC has departed from its traditional practice in asserting jurisdiction over gathering rates. See also INGAA Br. 15-16. That claim is a red herring. As the Commission explained, "[t]he issue of the Commission's authority to regulate the rates, terms, and conditions of gathering performed by pipelines on behalf of others has not previously arisen, because until recently pipelines generally did not perform such service" and "[t]here was therefore no need to give special scrutiny to gathering rates or services apart from regulation of the sale rates." Pet. App. 45a n.15. In regulating interstate sales, however, the Commission *has* long engaged in the equivalent of regulating gathering rates by setting the costs that

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[14] The impracticality of state regulation is illustrated by an exhibit to one of Northern's gathering contracts, which shows that Northern will provide gathering from two wells in Oklahoma to delivery points in Texas. Pet. App. 59a.

pipelines may include in their rate base.[15] By asserting authority over the rates for gathering provided as an integral part of interstate transportation, FERC is applying firmly established jurisdictional principles to current industry conditions.

2. Contrary to petitioner's contention (Pet. 16-24), the decision below does not conflict with the decision of any other court of appeals. In *Northwest Pipeline Corp* v. *FERC*, 905 F.2d 1403 (1990), the Tenth Circuit held that the Commission had applied an incorrect standard in determining that certain pipeline facilities were used for transportation rather than gathering.[16] The Tenth Circuit explicitly declined to decide the issue that was dispositive in this case, stating that "[u]ntil FERC resolves this ques-

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[15] As *Colorado Interstate* illustrates, FERC does not simply accept the market price for production and gathering, but rather sets a cost-based rate that allows the pipeline to recover its operating costs and a return on its investment. The wholesale purchaser pays a single FERC-regulated sales rate, not a FERC-regulated transportation rate plus an unregulated production and gathering rate. Thus, if the pipeline sells gas it has produced and gathered, the FERC-regulated sales rate comprehends a regulated rate for production and gathering. This approach has been followed by FERC for decades—with respect to petitioner's sales rates as well as others. See, *e.g.*, *Northern Natural Gas Co.*, 12 F.P.C. 66, 70-83 (1953) (Buchanan, Chairman, dissenting); *Northern Natural Gas Co.*, 11 F.P.C. 174, 200-208 (Smith, Comm'r, concurring), modified, 11 F.P.C. 400 (1952); *Northern Natural Gas Co.*, 11 F.P.C. 123, 150-153 (Smith, Comm'r, concurring), reh'g denied, 11 F.P.C. 375 (1952), aff'd *sub nom. State Corp. Comm'n* v. *FPC*, 206 F.2d 690 (8th Cir. 1953), cert. denied, 346 U.S. 922 (1954).

[16] FERC did not reach that issue here, but assumed for purposes of its decision that petitioner's services were actually "gathering" within the meaning of Section 1(b). Pet. App. 42a, 44a.

tion [whether the facilities were gathering or transportation facilities], we do not consider its alternate argument that sections 4(a) and 5 of the NGA * * * provide another mechanism for asserting jurisdiction to review the rates charged." 905 F.2d at 1411 n.23. As the court of appeals noted in this case, "[t]here is no conflict between [the Tenth Circuit's] opinion and the theory of our decision. We determine precisely the issue that [the Tenth Circuit] declined to decide." Pet. App. 26a.[17]

Nor is petitioner correct in contending (Pet. 19-23) that the court of appeals' decision conflicts with *American Gas Ass'n* v. *FERC*, 912 F.2d 1496 (D.C. Cir. 1990), cert. denied, 111 S. Ct. 957 (1991). That case upheld FERC's refusal to claim jurisdiction under Section 5 of the NGA to modify the non-price terms of "take-or-pay" clauses in nonjurisdictional contracts betweeen producers and pipelines. 912 F.2d at 1505-1507.[18] The court rejected the contention that Section 5 of the NGA provides jurisdiction over

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[17] Both petitioner and INGAA attribute the Tenth Circuit's statement in *Northwest Pipeline* that the Commission does not have "express or implied rate-regulatory jurisdiction of the production and gathering of gas" to a quotation from this Court's opinion in *Colorado Interstate*. Pet. 17, 18; INGAA Br. 18-19. As is clear from the Tenth Circuit's opinion, 905 F.2d at 1406, however, the quoted language is from the court of appeals' opinion in *Colorado Interstate* v. *FPC*, 142 F.2d 943, 952 (10th Cir. 1944), aff'd, 324 U.S. 581 (1945). In any event, the quoted statement did not purport to address the issue presented in this case, which the Tenth Circuit expressly reserved.

[18] "A take-or-pay clause requires a purchasing pipeline to take a specified volume of gas from a producer, or, if it is unable to do so, to pay for the specified volume." *Mobil Oil*, 111 S. Ct. at 622 n.3.

"any contract that would likely influence a pipeline's end-of-the-pipeline charges." *Id.* at 1505. The court of appeals did not uphold such an attenuated theory of jurisdiction in this case. Rather, its decision was "narrowly confined to rates for gathering by an interstate pipeline over its own lines in connection with jurisdictional interstate transportation." Pet. App. 22a.

Even farther afield are *Mobil Oil Corp.* v. *FPC*, 463 F.2d 256 (D.C. Cir. 1971), cert. denied, 406 U.S. 976 (1972), and *Pennzoil Co.* v. *FERC*, 645 F.2d 360 (5th Cir. 1981). See Pet. 22-23. In the former, the court held that the Commission had no jurisdiction under the NGA to regulate payments made by natural-gas producers to landowners. The court found that the landowners, in entering into leases with producers that called for royalty payments, were not sellers of gas for resale in interstate commerce because the transactions were "too far removed from the interstate sale." 463 F.2d at 258, 263. Here, of course, petitioner's gathering service is integral to its interstate transportation of gas and constitutes but one component of a single transaction. In *Pennzoil*, the court held that FERC had no jurisdiction over price-escalation clauses in contracts removed from NGA jurisdiction. 645 F.2d at 380-382. No issue was presented with respect to FERC's jurisdiction to regulate gathering rates "in connection with" jurisdictional sales.

3. Finally, petitioner argues (Pet. App. 24-26) that the Commission is impermissibly asserting "selective" jurisdiction by regulating the rates for gathering performed by pipelines in connection with interstate transportation, but not regulating the rates for gathering performed by non-pipelines (such as producers or independent gathering companies).

The Commission, however, explained that the potential for anticompetitive abuse in the instant context is not present in the other situations noted by petitioner. Pet. App. 44a. As the court of appeals pointed out, *id.* at 28a, independent producers or gatherers do not possess monopoly power over transportation facilities; thus, the Commission's refusal to assert jurisdiction over the gathering rates they charge is consistent with the NGA and the Commission's Order No. 436. Although petitioner asserts (Pet. 26 n.8, 27 n.10) that its gathering rates are established by a competitive market, the record in this case provides no support for that contention. This case, therefore, does not present the question whether the existence of competition in gathering markets is relevant to the Commission's authority to set gathering rates under the NGA.[19]

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[19] Petitioner also briefly contends (Pet. 27-28) that FERC cannot regulate the gathering activities of separately incorporated affiliates of a pipeline. That issue, however, is not presented in this case. Neither the Commission's orders nor the opinion below discuss the issue, and no record was developed concerning the extent of petitioner's control over its affiliates' gathering facilities. Petitioner concedes (Pet. 2) that it is an interstate pipeline and does not contend that it has any affiliates that are not themselves "natural-gas companies" subject to NGA regulation but that are adversely affected by the orders under review. Accordingly, the application of the decision below to a separately incorporated affiliate does not warrant review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NORTHERN NATURAL GAS COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

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REPLY BRIEF OF NORTHERN NATURAL GAS COMPANY

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REPLY BRIEF OF NORTHERN NATURAL GAS COMPANY

Northern Natural Gas Company (Northern) respectfully submits its Reply to the Briefs in Opposition of the Federal Energy Regulatory Commission (FERC) and Producer Respondents (Producers). Neither FERC nor Producers have denied the far-reaching, industry-wide impact of FERC's assertion that it has jurisdiction to regulate gathering under its newly-discovered interpretation of the Natural Gas Act of 1938 (NGA), 15 U.S.C. §717 *et seq.* In their attempts to defend the attenuated theory that jurisdiction over gathering somehow flows from the rate provisions of NGA Sections 4 and 5, 15 U.S.C. §§717c and 717d, FERC and Producers cannot obscure the fact that the opinion below is in direct conflict with express statutory language, opinions of this Court, and opinions of the Tenth Circuit and D.C. Circuit.

ARGUMENT

1. FERC attempts to blur the distinction between gathering and transportation by alleging that gathering conducted by an interstate pipeline prior to interstate transportation "is in reality a single act of interstate transportation" and that gathering "constitutes but one component of a single transaction." (FERC Br. at 14, n. 9; 23.) As noted in Producers' Brief, the opinion below even went so far as to describe the movement of gas through gathering facilities as "transportation" rather than "gathering," stating that " 'the agency may regulate rates charged for *transportation* on the pipeline's own gathering facilities. . . .' " (Producers Br. at 4, citing App. at 3a; emphasis added.) In contrast to these attempts to engulf the activity of "gathering" totally within the activity of "transportation," Congress clearly distinguished between, and separately addressed, "transportation of natural gas in interstate commerce" and "gathering of natural gas," with FERC jurisdiction placed over the former but explicitly

excluded from the latter. NGA Section 1(b), 15 U.S.C. §717(b). FERC's newly-found interpretation of the NGA is directly contradicted by its own past finding that "[t]he history of Commission and court interpretation of Section 1(b) . . . makes clear that there is a distinction between gathering and transportation, such that the two functions are mutually exclusive." *The Superior Oil Co.*, 13 FERC ¶61,218 at 61,497 (1980).[1] FERC cannot be allowed to submerge nonjurisdictional gathering under the rubric of jurisdictional "transportation" and thereby circumvent the clear command of Congress.

FERC next attempts to justify an expansion of its jurisdiction to gathering by arguing that gathering is "integrally tied to" transportation in interstate commerce and "part of a continuous flow of gas over [an interstate pipeline's] own facilities . . . ." (FERC Br. at 11-12.) The flaw in FERC's argument is that Congress was well aware that gathering, interstate transportation and distribution were "integrally tied" when it explicitly excluded gathering and distribution from regulation under the NGA. As stated by this Court, "Congress knew this necessary relationship between production and distribution but excluded the Commission from exercising any direct control or regulation over the actual production and gathering of natural gas." *F.P.C.* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 507 (1949). The fact that gathering is "part of a continuous flow of gas" through gathering, transmission and distribution facilities also was well known to Congress when it placed the gathering and distribution aspects of the natural gas industry beyond FERC's control. As stated by this Court, "Congress was 'meticulous' only to invest the Com-

[1] FERC claims that the legislative history of the NGA should be ignored because "the statement by FPC Solicitor DeVane . . . that the Commission would not have jurisdiction over 'gathering rates' was not addressed to the situation that the Commission confronted here of an integrated pipeline-gatherer establishing putatively separate rates for what is in reality a single act of interstate transportation." (FERC Br. at 14, n. 9.) In light of FERC's own recognition that gathering and transportation are "two functions [that] are mutually exclusive," *Superior Oil*, *supra*, 13 FERC at 61,497, there is no merit to this claim.

mission with authority over certain aspects of this field, leaving the residue for state regulation." *F.P.C.* v. *Transcontinental Gas Pipe Line Corp.*, 365 U.S. 1, 8 (1961) (*Transco*); *Northwest Central Pipeline Corp.* v. *State Corp. Comm'n of Kansas*, 109 S.Ct. 1262, 1273-74 (1989); *Panhandle*, *supra*, 337 U.S. at 502-03.

2. FERC argues that it must extend its jurisdiction to gathering because "state regulation of the gathering service is impracticable." (FERC Br. at 20.) FERC's opinion as to the impracticability of state regulation of gathering, however, does not constitute statutory authority to regulate an area from which it has been expressly excluded by Congress. FERC's argument that state regulation of gathering is impracticable was rejected by the Tenth Circuit, which found that the "assertion that Colorado and Utah have no interest or an adverse interest in this regulation is speculative." *Northwest Pipeline Corp.* v. *F.E.R.C.*, 905 F.2d 1403, 1412 (10th Cir. 1990). FERC's dim view of the ability of states to regulate gathering stands in marked contrast with the fact that states routinely regulate production through proration regulations affecting literally thousands of wells. *See Northwest Central*, *supra*.

FERC claims that the "impracticality of state regulation is illustrated by" an instance in which Northern provides "gathering from two wells in Oklahoma to delivery points in Texas." (FERC Br. at 20, n. 14.) FERC's argument is contradicted by its own prior finding that "gathering does not become jurisdictional on the basis that the facilities employed therefor cross a state line":

> As to the jurisdictional consequences of the subject facilities crossing a state line, we do not believe the Section 1(b) exemption is affected. The exemption in Section 1(b) of gathering from the Commission's Natural Gas Act jurisdiction is made without regard to whether the facilities involved cross a state to state or federal to state boundary. The history of Commission and court interpretation of Section 1(b), as noted *supra*, makes clear

> that there is a distinction between gathering and transportation, such that the two functions are mutually exclusive. Consequently, otherwise non-jurisdictional production or gathering does not become jurisdictional on the basis that the facilities employed therefor cross a state line.

Superior Oil, supra, 13 FERC at 61,497; *Beacon Gasoline Co.*, 30 FERC ¶61,041 (1985); *Chase Gathering Systems, Inc.*, 16 FERC ¶61,199 (1981).

FERC also cannot justify its intrusion into an area Congress has reserved to the states merely by alleging that "no state regulatory body has asserted jurisdiction over the gathering rates at issue here" and that Northern has not contended that "FERC regulation is inconsistent with state law." (FERC Br. at 20.) As an initial matter, Congress did not *require* states to regulate gathering; in excluding gathering from FERC jurisdiction, Congress simply *reserved* such area to the states. *Transco, supra*, 365 U.S. at 8; *Northwest Central, supra*, 109 S.Ct. at 1273-74; *Panhandle, supra*, 337 U.S. at 502-03. Second, FERC's argument as to the absence of conflict with state law overlooks the fact that FERC must first have statutory authority to regulate an area; the *absence* of state regulation does not constitute the *presence* of statutory authority for FERC to regulate. In fact, this absence of state regulation, after over 50 years of gathering service by interstate pipelines, intrastate pipelines, independent gathering companies and natural gas producers, is evidence of the competition which exists in the gathering field, not justification for FERC's intrusion into an area from which it has been explicitly excluded.[2]

3. Quoting the opinion below, FERC alleges that its regulation of gathering rates " 'is the substantial equivalent

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[2] FERC's suggestion that a state may act in the future to regulate gathering rates and that such regulation may interfere with FERC's regulation of sales for resale and transportation in interstate commerce (FERC Br. at 20) is sheer speculation and cannot serve as a prop to support FERC's assertion of jurisdiction over gathering here.

of the control of *rates* for gathering upheld in *Colorado Interstate.*' " (FERC Br. at 16, citing App. at 17a-18a; emphasis added.) Producers go so far as to allege that "[t]his Court has previously held that the *rates* charged for the gathering portion of the transportation service included in the rate for sales for resale can be regulated by the Commission." (Producers Br. at 3; emphasis added.) Both statements confuse FERC's authority to establish a *rate* for the provision of a jurisdictional service and its authority to review the *costs* included in a rate which it establishes for a jurisdictional service. Neither *Colorado Interstate Gas Co.* v. *F.P.C.*, 324 U.S. 581 (1945), nor any other case has ever found that FERC has the authority to do what it has done in this case—establish a *rate* for an interstate pipeline's gathering of gas for third parties. *Colorado Interstate* in fact made clear that while FERC could review the *costs* included in the sales for resale *rate* which it has the authority to establish, it has no authority to establish a *rate* for a nonjurisdictional service because "the authority of the Commission to suspend rates is restricted to rates over which it has jurisdiction." 324 U.S. at 596. Contrary to FERC's claim (FERC Br. at 17, n. 11), such statement is not quoted "out of context," but, like other statements of this Court, makes explicit that FERC's jurisdiction over rates for a service is determined by the jurisdictional provisions of Section 1(b), not the rate provisions of Section 4.[3]

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[3] FERC cites *Mid-America Pipeline Co.* v. *F.P.C.*, 330 F.2d 226, 228-29 (D.C. Cir. 1964), to support its claim that "a finding that FERC has rate jurisdiction over an activity does not require that the Commission have certificate jurisdiction." (FERC Br. at 19, n. 13.) However, *Mid-America* does not support FERC's claim in any respect. In *Mid-America*, the court upheld FERC's refusal to require a certificate for operation of an extraction plant used to extract natural gas liquids from the gas stream and return the residue natural gas to an interstate pipeline. Consistent with *Colorado Interstate*, the court found that the interstate pipeline's jurisdictional customers were protected by FERC's ability to allocate costs in the interstate pipeline's rate case between its jurisdictional service and the nonjurisdictional liquids operation. 330 F.2d at 228-30. Thus, FERC neither required a certificate for operation of the

Producers allege that "[r]ates for gathering charged by interstate pipelines, such as Northern, have routinely been regulated for nearly half a century . . . ." (Producers Br. at 4.) Producers again attempt to confuse FERC's review of gathering costs included in a jurisdictional sale for resale rate with the total absence in over 50 years of NGA regulation of any FERC assertion of jurisdiction to establish rates for the gathering of natural gas by interstate pipelines for third parties. FERC, however, admits that it did not regulate the rates for third party gathering by interstate pipelines because of its view that the volumes were relatively small and " '[t]here was therefore no need to give special scrutiny to gathering rates or services apart from regulation of the sale rates.' " (FERC Br. at 20.) However, the mere fact that there has been an increase in the volumes gathered for third parties does not modify or negate the statutory exclusion of gathering from FERC jurisdiction.[4]

4. FERC attempts to avoid the conflict between the opinion below and *American Gas Association* v. *F.E.R.C.*, 912 F.2d 1496 (D.C. Cir. 1990), *cert. denied*, 111 S.Ct. 957 (1991) (*AGA*), by claiming that the "attenuated theory of jurisdiction" rejected in *AGA* was not adopted in this case. (FERC Br. at 22-23.) However, the "attenuated theory" of using the rate provisions of NGA Sections 4 and 5 to reach out and control a nonjurisdictional activity that "af-

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extraction plant nor asserted jurisdiction over the rate for sales of natural gas liquids. FERC's role was limited to the allocation of costs between the jurisdictional and nonjurisdictional services.

[4] Producers also confuse FERC's assertion of authority to require the filing of, and FERC determination of, the rate for the nonjurisdictional service of gathering contained in the orders at issue, with the reference to identification of "cost components" in a rate for jurisdictional sales or transportation service contained in FERC's Order No. 436, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 50 Fed. Reg. 42,408 (Oct. 18, 1985), FERC Stats. & Regs., Regulations Preambles 1982-1985 ¶30,665 (1985). (Producers Br. at 9-10.) Producers' claim that appeal of the orders at issue is a "collateral attack" on the appeal of the Order No. 436 regulations is so lacking in merit that it was not even discussed by the court below.

fects" a jurisdictional activity is the same in both cases.[5] In direct conflict with the opinion below, *AGA* upheld FERC's own rejection of the "attenuated theory" that jurisdiction flows from the rate provisions of NGA Section 5. (*See* Pet. at 19-23.) As FERC itself stated in one of its orders affirmed in *AGA*:

> Here, pipelines and LDCs would have the Commission go beyond considering the pipeline-producer contracts in establishing the pipeline's jurisdictional rates, such as the pipeline's sale for resale rates. They would have the Commission exercise its section 5 authority with respect to contracts 'affecting' jurisdictional rates to directly modify the contract for the non-jurisdictional first sale from the producer to the pipeline. However, this contract is analogous to the contracts for the non-jurisdictional direct sales involved in *Panhandle* [*Pipe Line Co.* v. *F.P.C.*, 324 U.S. 635 (1945)]. Just as in *Panhandle*, section 5 did not give the Commission authority to modify directly the contract for the non-jurisdictional direct sale, so also section 5 does not give the Commission authority to modify the contract for the non-jurisdictional new gas sales here involved.

Order No. 500-H, Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, 54 Fed. Reg. 52,344 (Dec. 21, 1989), FERC Stats. & Regs., Regulations Preambles 1986-1990 ¶30,867 at 31,540 (1989). FERC itself recognized that if such "attenuated theory" were adopted it "would mean that the Commission could directly modify any non-jurisdictional contract which affected a pipeline's jurisdictional rates, including labor contracts between the pipeline and its employees, contracts for the purchase of office equip-

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[5] In asserting jurisdiction over gathering in its orders at issue in this proceeding, FERC emphasized both the "in connection with" and the "affecting" language of NGA Sections 4 and 5. (App. at 42a-43a; 52a-53a.)

ment, and leases of office space" and "[t]he Commission has never claimed, nor has any court suggested, that section 5 gives the Commission authority to directly modify such contracts." *Id.*

5. FERC fails to explain away its discriminatory assertion of jurisdiction over the gathering conducted by interstate pipelines, but not gathering conducted by producers or independent gathering companies, by claiming that "the potential for anticompetitive abuse" is not present in the case of these other entities. (FERC Br. at 23-24.) As an initial matter, a federal agency's opinion as to "the potential for anticompetitive abuse" in an activity cannot serve as a substitute for statutory authority to regulate the activity where such power has been denied by Congress. FERC's remedy is to present facts as to alleged "anticompetitive abuse" to Congress and request statutory authority, not to annex unilaterally a nonjurisdictional area.

Second, while the opinion below relies on FERC's assertion that there is a "potential for anticompetitive abuse" by interstate pipelines discriminating against third party transportation volumes in favor of their own system supply (App. at 19a-20a), FERC recently announced that it was necessary "to recognize the current characteristics of the natural gas industry—which is now dominated by pipeline transportation, not by traditional merchant service . . . ." Pipeline Service Obligations and Revisions to Regulations Governing Self-Implementing Transportation, Notice of Proposed Rulemaking, 56 Fed. Reg. 38,372 (Aug. 13, 1991). Thus, while FERC states that there is no record in this case to support Northern's assertion that "gathering rates are established by a competitive market" (FERC Br. at 24), FERC's own admission that the industry is "dominated" by transportation, not sales of pipeline system supply, supports Northern's statement that "Northern and many other interstate pipelines are now primarily transporters of third-party gas, with the incentive to maximize transportation of such volumes, not discriminate against them." (Pet. at 26.) As a result, there is no basis for FERC's discriminatory regulation of only gathering con-

ducted by interstate pipelines because "all companies which provide gathering, including interstate pipelines, have an incentive to keep their gathering rates competitive in order to maximize use of their gathering facilities." *Id.*[6]

FERC also attempts to justify its discriminatory regulation of gathering by interstate pipelines by alleging that failure to assert jurisdiction "would 'permit the *pipeline* to establish rates for the interstate transportation.' " (FERC Br. at 18, emphasis in original). Yet, FERC wholly fails to explain how an interstate pipeline's unregulated rate for gathering would "establish" the rate for interstate transportation any more than the unregulated gathering rate of producers, independent gathering companies and intrastate pipelines. In each case, regardless of the particular owner/operator of the facility, the rate is for the gathering service, not transportation, and, as the Commission itself previously has found, gathering and transportation are "two functions" which are "mutually exclusive." *Superior Oil, supra,* 13 FERC at 61,497.[7]

6. With respect to the holding extending FERC jurisdiction to an interstate pipeline's separately incorporated affiliate engaged solely in gathering, FERC does not deny that this issue was not argued before FERC or the court below. (FERC Br. at 24, n. 19.) Despite this lack of due

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[6] FERC fails to recognize that an interstate pipeline's gathering service must compete against the gathering service of other interstate pipelines as well as against the gathering service of producers, independent gathering companies and intrastate pipelines. Further, all entities which conduct gathering are subject to competition not only from existing gathering facilities but also from new gathering facilities that could bypass existing systems, including an individual line that would establish a dual gathering connection for a well.

[7] Significantly, neither FERC nor Producers dispute the discriminatory impact of FERC's assertion of jurisdiction based solely on the type of operator—"[t]o the extent FERC's regulation keeps Northern's gathering rates below the unregulated gathering rates charged by producers, gathering companies and intrastate pipelines, producers are able to obtain a higher price for their gas when Northern provides the gathering," thereby transferring dollars "from the pipeline's gathering service . . . to producers' pockets." (Pet. at 26-27.)

process, FERC does not disavow the holding, but, rather, seeks to avoid review by claiming that the issue is "not presented in this case." *Id.* While FERC suggests that "application of the decision below" to a particular affiliate can await future court review (*id.*), the issue squarely presented here is whether FERC has jurisdiction over *any* affiliate of an interstate pipeline which is separately incorporated and engaged solely in gathering. Given that this sweeping holding is in direct conflict with express statutory language and opinions of this Court, review is warranted at this time.

CONCLUSION

For the reasons stated above and in Northern's Petition, Northern respectfully prays that the Court grant review of the opinion below.

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